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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

vs.

WEST VIRGINIA PULP AND PAPER CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 13, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

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[a]

APPENDIX TO APPELLANT'S BRIEF

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 5442

WEST VIRGINIA PULP & PAPER COMPANY, APPELLANT,

VERSUS

A. N. CONE, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON.

[Stamp;] Filed Dec. 15, 1945, Claude M. Dean, Clerk.

[fol. 1] AMENDED COMPLAINT—Filed November 1, 1944

The Plaintiff above named, complaining of the Defendant above named, would respectfully show this honorable court:

1. That the Plaintiff is a citizen of the State of South Carolina, and is informed and believes that the Defendant is a corporation organized and existing under the laws of one of the States of the United States, and owns real estate in Colleton County, South Carolinia, operates a business in Colleton County, South Carolina, and maintains agents and servants, residents in Colleton County, South Carolina,

2. That the Plaintiff is the owner of a certain tract of land situate, lying and being in Dorchester County, State of South Carolina, adjoining lands of the Defendant. Said tract of land being more particularly described by deed of Caroline F. Cone to A. N. Cone, dated 16th August, 1920, and recorded in the office of the Clerk of Court of Dorchester County the 18th September, 1920, in Book 35 at page 288, as follows:

> All that certain lot, part, parcel or tract of land situated, lying and being in Burns Township, Dorchester County in the State aforesaid containing One

Hundred six and one-half (106½) acres, more or less. Bounded as follows, viz: North by lands of J. Lamb Perry, East by lands said to be owned by Burton Lumber Company, formerly Sarah Cone, South by lands of F. Goodwine, formerly Sarah Cone, and West by lands of M. C. Cone. All of above description more fully appears when reference is had to plat [fol. 2] of property hereby conveyed, made by Jas. A. Postell, Surveyor, dated August 16th A. D. 1920.

And has been in quiet, peaceable and exclusive possession of the same for more than twenty (20) years.

3. That the Plaintiff is informed and believes that the Defendant, its Agents and Servants, entered upon the said tract of land during the month of September, 1941, without Plaintiff's knowledge or consent, cut and destroyed a large quantity of timber on the said tract of land, and manufactured the same into lumber or sold same to be manufactured into lumber and removed the same from the said premises.

4. That the Plaintiff has never given the Defendant, its Agents or Servants, or anyone under whom it claims any permission or authority to enter upon the said land or to cut or to take therefrom any timber of any kind, but has ever since the fact came to his knowledge forbidden and used every reasonable means to have the Defendant desist from the trespasses above set forth; that the boundary lines of the said tract of land are well defined and marked, having been laid out by the Plaintiff, his Agents and Servants, and by former owners, more than twenty (20) years and acted upon and acquiesced in by them and all subsequent owners up to the time of the trespasses herein alleged, which facts were well known to the Defendant, its Agents and Servants, at the time the said trespasses were committed herein alleged; that the said acts and trespasses were wilful, wanton and outrageous and in disregard of the Plaintiff's rights.

[fol. 3] 5. That by reason of the acts and trespasses above set out the Plaintiff has been damaged in the sum of Twenty-five Thousand and no/100 Dollars ($25,000.00).

Wherefore, Plaintiff prays for judgment against the Defendant in the amount of Twenty-five Thousand and

no/100 ($25,000.00), and for the costs and expenses of this action.

Jeffries, McLeod & Unger, Attorneys for Plaintiff.
By H. Wayne Unger.

Walterboro, South Carolina, 27th October 1944.

EXCERPTS FROM TESTIMONY OF WITNESSES

Direct-examination of A. N. Cone.

By Mr. Unger:

Q. You are Mr. Ansell (Andrew) N. Cone, plaintiff in this case?
A. Yes, sir.
Q. Where do you reside.
A. At Ravenel.
Q. What is your occupation?
A. Farming.
Q. Do you own the tract of land described in the complaint which has been just read?
A. Yes, sir.
Q. From whom did you acquire this tract of land?
[fol. 4] A. From my mother.
Q. What was her name?
A. Caroline F. Cone.
Q. I hand you a deed, which is already in evidence of Caroline F. Cone to A. N. Cone, is that the deed under which you acquired the property?
A. Yes, sir.
Q. When did you acquire it?
A. In 1920.
Q. Did you have it surveyed?
A. Yes, sir.

The Court: That deed is not in evidence.

Mr. Waring: Your Honor, I understood a certified copy was to be put in.

The Court: That is the original deed, a certified copy is not necessary if they have the original, either the original or a certified copy.

Mr. Unger: (Offers exhibit)—Plaintiff offers in evi-

dence deed, Marked Pltfs. Ex.-A. (Ex. P-A) dated the 16th of Aug. 1920, deed of Caroline F. Cone to A. N. Cone, recorded the 18th of September, Book 35, page 288.

The Court: This deed was actually left in the custody of the clerk, it was put in evidence but it was put in the custody of the clerk and was to be admitted without formal proof.

Mr. Waring: I am sorry, perhaps I misunderstood.

Q. You had the land surveyed, Mr. Cone?

A. Yes, sir.

Q. Were you given a plat of the land after it was surveyed?

A. Yes, that is it, that is the plat.

[fol. 5] The Court: What is the date of the plat?

A. August 16, 1920.

Q. By whom was it surveyed?

A. J. A. Postell.

Q. When did you enter into possession of this tract of land?

A. That was in 1920.

Q. State whether or not you have listed the same for taxes?

A. Oh, yes, sir. I paid taxes on it from 1920 on down—1921 was the first taxes I paid on it.

Q. Have you ever actually entered on the land since the deed?

A. I have hunted on it, got wood on it, got clapboards, covering for out barns and houses, two and three-foot boards.

The Court: How did he get them, did he cut down trees?

A. I cut some lying down and sawed them up and stood them up.

Exhibit: Plat of J. A. Postell marked in evidence as plaintiff's Exhibit, Ex. P-B.

Q. Trees that were fallen trees. Can you tell approximately when you did these acts?

A. 1923 and 1925.

Q. From whom did your mother secure this property, if you know?

A. From my daddy.

Q. Do you know about when?
A. It was along about 1917.
Q. Do you have a deed from your father to your mother?
[fol. 6] A. Do I have a deed from my father to my mother?
Q. Yes?
A. No, I haven't got that deed.
Q. Do you know what became of it?

Objection by Mr. Waring: I don't think that is competent.

The Court: I will have to sustain the objection.

Q. Was your mother in possession of this property?
A. Yes.
Q. How long was she in possession of it?
A. From 1917 to 1920.
Q. From 1917 to 1921; was your father in possession of this property prior to 1917?
A. Yes, sir.
Q. For how long?

Objection by Mr. Waring: That is not competent, your Honor.

The Court: If he can connect the title from the father to the mother, he hasn't done it yet, I will direct that the testimony be stricken out if not connected.

Mr. Waring: This is all verbal, your Honor.

The Court: Subject to it being connected up with the present owners, that will be all right.

Mr. Unger: We are showing a transfer of possession from his father to his mother.

The Court: No, you are showing possession.

Q. Your father was in possession of this land prior to your mother?
A. Yes, sir.
Q. Approximately how long?
A. How long my father was in possession?
Q. Yes?
[fol. 7] A. That has been since about 1888.
Q. Do you know from whom your father got the property?
A. From whom my father got it?

Q. Yes?

A. He got it from his father.

Q. Your father got the property from your grandfather?

Q. By the Court (After Mr. Waring says, "This is not proper"): Mr. Cone, did he get it by deed?

A. Yes, sir.

The Court: Produce the deed.

The Court: It would be competent testimony if you have a deed.

Mr. Unger: This is a certified copy from the Clerk of the Court.

The Court: What?

A. It is a deed from A. Miles Cone to Miles Cone.

The Court: The deed is dated December 19, 1888.

Objection by Mr. Waring: I object to the introduction of that deed in evidence because I point out that the description in that deed has no relation to the property at issue in this action and is not the property involved in this action.

The Court: I don't know whether it is or not and you can't put in evidence on all things at one time. I will admit it subject to it being connected up with the property. It goes in subject to it being connected.

Exhibit: Deed from A. Miles Cone to Miles Cone dated December, 1888, marked Ex. P-C.

Q. (Reading from Ex. No. P-C) "Know all men by these presents, that I, Adam Miles Cone,"

[fol. 8] Was your grandfather Adam Miles Cone?

A. Yes, sir.

Q. (Reading on) "of St. Paul Parish, Colleton County, in the State aforesaid, Farmer, in consideration of the Sum of Three Hundred Dollars to me paid by Miles Cone"

What was your father's name?

A. Miles Cone.

Q. (Reading on) "in the State aforesaid, Farmer, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Miles Cone all of that piece or parcel of land situate in St. Paul's Parish, County and State aforesaid, containing Two Hundred and Forty-eight acres, more or less,

and bounded on North by A. S. J. Perry, South by Est. of Jennings Perry. On the West by Franklin Cone and on the East by John Cone, formerly known as the Josiah Perry Estate Tract."

Are you familiar with that tract?

A. Yes, sir.

Q. State whether or not the one hundred six acres tract in controversy is a part of this tract?

Objection by Mr. Waring: We object to that.

The Court: He wasn't there when that was made.

Mr. Unger: He is familiar with the tract, it was his father's, he is testifying.

The Court: Do you know where the land described in that deed was?

A. Yes, sir.

The Court: How do you know?

A. Well, I have been on it and around it and saw it.

The Court: You are familiar with those boundaries?

[fol. 9] A. Yes, sir.

The Court: Q. Those are the same boundaries as the same tract now claimed by you?

A. Yes, sir.

The Court: He says it is the same tract and I will admit the testimony.

Mr. Waring: I object, your Honor, and ask an exception.

The Court: Exception noted.

Q. State whether or not the 106 acres is a part of this tract?

A. It is separate from that tract.

Q. Is it a part of this tract of land or not?

A. A part of the 248 acres.

Q. This tract of land is bounded on the North by A. S. J. Perry, on the South by Jennings Perry, on the West by Franklin Cone and on the East by John Cone. Do you know where Franklin Cone's land was?

The Court: He asked if the tract you are suing about today is a part of the 248 acres of land or not?

A. I think it is separate there, isn't it? The 248 acres is separate.

The Court: He wants to know if the part sued about today is part of the 248 acres or not, do you know?

A. It is a part of it.

Q. Who owns what is remaining of this tract now?

A. My brother.

Q. What is your brother's name?

A. Owen Cone.

Q. Have you ever been over this piece of land, the 106 acres?

A. Yes, sir.

[fol. 10] Q. Have you ever seen any markers in this?

A. No, sir.

Q. You never examined any markers?

A. No.

Q. Have you ever been over this with your father?

A. Yes, sir.

Q. What acts have you exercised with your father there in his lifetime?

A. Well, I just,—I cut wood and board and hunted on it during my father's lifetime.

Q. During his lifetime did he ever exercise any act of possession over this land?

Objection by Mr. Waring: I object.

Q. Were you present with him?

A. Yes, sir.

Q. What acts of possession did he exercise in your presence?

A. Well, he helped me get out ply-boards together.

Q. What other acts?

A. Well, he hunted on it and got wood.

Q. What kind of land is this, are there any cultivated fields on it?

A. No, sir, it is all swamp lands, timber land.

Q. Is there any settlement on it?

A. No, sir.

Q. Has there been any settlement to your knowledge?

A. Not to my knowledge.

Q. Are there any natural boundaries of this 106 acres, any streams running?

A. A canal running.

Q. On what side?

A. On the North side.

[fol. 11] Q. On the North side of this piece of land is a canal?

A. Yes, sir.

Q. How about on the West side?

A. On the West there is a little bank.

Q. A little bank on the West, how about on the East side?

A. Well, there is a fence used to be there, it is down now, on the East on the John Cone land, on the South side of that, South and East.

Q. Do you know who formerly owned the lands surrounding,—who bound the land on the East?

A. That was John Cone, Uncle John.

Q. Who later owned it, what relation was he to you?

A. My uncle.

Q. Do you know any subsequent owners after John Cone on the East?

A. Burton Lumber Company.

Q. Did Wesley Cone ever own it?

A. Yes, sir.

Q. Who now owns it on the East?

A. West Virginia Pulp and Paper Company.

Q. Who formerly owned the land on the North of this?

A. J. Lamb Perry.

Q. Who now owns it?

A. West Virginia Pulp & Paper Company.

Q. Who formerly owned on the South of this?

A. On the South, that was John Cone, too.

Q. And later who owned it?

A. Later, Sarah Cone.

Q. Who, do you know anybody else who owned it on the South?

[fol. 12] A. Jim Cone.

Q. And who else?

A. Fred D. Goodwine.

Q. Who now owns it?

A. West Virginia Pulp and Paper Company.

Q. They owned the land on three sides of this tract?

A. True.

Q. Who owns on the West side?

A. My brother on the West.

Q. Have you ever given the West Virginia Pulp &

Paper Company any permission to cut any timber on this land?

A. No, sir.

Q. Have they cut any timber on this land?

Objection by Mr. Waring: I object, your Honor.

The Court: If he knows of his own knowledge he can testify.

A. I went there and saw them cut it. I saw them cutting.

The Court: Whom did you see cutting the timber?

A. I saw some white men and a darky hauling logs out of the swamp, I saw them sawing, edging the logs and loading them on a truck.

Q. Did you talk to any of them?

A. I did.

Q. Do you know for whom they worked?

A. They were supposed to be working for Mr. Cooley.

Q. Did you talk with the man who was measuring the logs?

A. No, sir, my lawyer did. I didn't talk with him.

Q. Approximately how many men did you see on this land cutting the timber?

[fol. 13] A. About 10.

Q. Were there any mules in there?

A. Mules was hauling the logs out.

Q. About how many.

A. I saw some three or four carts coming out.

Q. When was this you saw the timber being cut?

A. Along about the latter part of September or the first of October, 1941.

Q. Do you know about how long there was cutting in there?

A. I don't know how long they stayed in there.

Q. Did you take any steps to stop them?

A. I turned it all over to my lawyer.

Q. You turned it over to your lawyer to stop it?

A. Yes, sir.

Q. Mr. Cone, has anyone ever claimed that piece of land outside of yourself, to your knowledge?

Objection by Mr. Waring: That is taking in a lot of territory.

Q. To your knowledge, Mr. Cone?

A. The Court: Well, he claims it, what do you mean?

Q. Has anyone had any controversy about the possession of this land?

A. No, sir.

Q. Has anyone ever opposed your possession?

A. No, sir.

Q. Did anyone ever oppose possession of your mother to this land?

A. No, sir.

Q. Or of your father to this land?

A. No, sir.

[fol. 14] Q. As I understand it, your testimony is that in your opinion this deed to your father from your grandfather is this—was a part of the tract of land that your grandfather deeded to your father under that deed, is that correct?

A. Yes, sir.

Q. Do you know whether or not your grandfather had any possession of this land?

A. I don't know whether he did or not.

Q. Was there any familiar information about this tract of land in your grandfather? State whether or not it was familiar knowledge that this was part of your grandfather's land?

A. Yes.

Objection by Mr. Waring: Let him state how he knows.

The Court: That is very vague, did your father ever tell you anything about this piece of land?

A. He said it was grandfather's.

Q. How much damage was done to the timber on this property?

A. Twenty-five Thousand ($25,000.00) Dollars.

Cross-examination of A. N. Cone.

By Mr. Waring:

Q. You say Twenty-five Thousand ($25,000.00) Dollars was the damage done, it couldn't have been Twenty-four Thousand Nine Hundred and Ninety-nine ($24,999.00) Dollars? Could it?

A. Well, I put $25,000.00.

[fol. 15] Q. Why do you say $25,000.00, how do you get that figure?

A. The way the timber is cut, the timber is torn up.

Q. Do you know how much timber is cut?

A. Not exactly.

Q. Do you know the value of it?

A. No.

Q. Then you can't say how much damage was done, can you, that is just a guess you are making, isn't it?

A. Well, excepting what the timber is worth, so much a thousand, stumpage.

Q. You don't know how much was taken, you are just making a guess as to the figure, aren't you, isn't that true? You don't know it was $25,000.00?

A. What do you want me to answer?

The Court: Get the answer down, do you know what timber was worth and what its value was and why you claim $25,000.00 damages?

A. I judge it to be that, I never estimated it. I am no timber estimater.

Q. How do you know $25,000.00 of damage was done, suppose you state that?

A. Well, I don't know just about how much, I just guess it at about how much the damages were.

Q. You have no method of arriving at that figure, have you?

A. I don't.

Q. Mr. Cone, is your mother living?

A. No, sir.

Q. When did she die?

A. She died in 1924.

Q. Is your father living?

[fol. 16] A. No, sir.

Q. When did he die?

A. He died in 1941.

Q. You say you went over this particular property you are talking about with your father?

A. Yes, sir.

Q. Now, did you ever build a fence on it?

A. No, sir, I never built no fence.

Q. You never plowed it, it wasn't cultivated?

A. No, sir, it was timber land.

Q. How often did you go on it, you say you have been on it, how often?

A. I was raised right close on it,, I have hunted upon it all my life and got out clapboards and got out wood.

Q. When was the last time you have been on it?

A. A couple of years, I reckon.

Q. Did you go on it?

A. Since it has been in dispute I went on it. I went to the land corners and——

Q. Did you walk it pretty thoroughly at that time?

A. No, I didn't walk it.

Q. You couldn't know how much was taken off?

A. I walked it before it was cut.

Q. When was that?

A. That was 1923 and 1925 and all through there. Right on through there.

Q. You haven't been on it since?

A. Yes, sir.

Q. When was the last time after 1923?

A. I went practically every year.

Q. You just went on it during hunting season?

[fol. 17] A. Yes, sir.

Q. The rest of the year you didn't go on it?

A. I would be busy, I didn't have time.

Q. You live some distance from there?

A. Yes, sir.

Q. When you were hunting you would go on it pretty thoroughly, this particular tract of land?

A. Yes, sir.

Q. Have you been on it in the last 10 years?

A. Yes, sir.

Q. You have been hunting over there in the last 10 years?

A. Oh, yes, sir; it is a good place to kill turkeys.

Q. When you go over there you do go over a pretty good part?

A. I go over all of it.

Q. You are familiar with the fire lines on it?

A. No, sir.

Q. You have never seen a fire line and posters put on there saying "No Trespass"? "No Trespassers"?

A. I never saw none.

Q. Have you put any on it?

A. No, I didn't. My father never did post none of his property.

Q. You are familiar with this dam that runs between the lines of your father and this property, isn't there a dam?

A. A canal dam runs East and West, a canal dam.

Q. I am thinking of one, a dam or bank running North and South?

A. Yes.

Q. Isn't there one that runs along?

[fol. 18] A. Yes, a bank runs North and South.

Q. And your father had the lands just West of that, didn't he?

A. Yes, he owned land just West of it.

Q. And there is a very distinct bank along there dividing that property?

A. Yes, sir.

Q. Isn't there a fire line that runs just East of that bank?

A. I never saw it, if it was.

Q. You have never seen it?

A. It was thick woods in there and logs and tree tops, you couldn't hardly see.

Q. Did you ever see the fire lines?

A. Yes, they run to the corner every year, a six-acre field that belonged to my uncle, they run that every year, they didn't go on this 106 acres, they just come to the corner and stopped and turn and go back. Every year they run them.

Q. You are sure you know where this property is?

A. Yes, sir.

Q. And you have never seen the fire lines on this property?

A. I never did see it.

Q. If others were to say so they must be mistaken because you never have seen it?

A. If any was there I never saw it.

Q. The time this property was being cut by Mr. Cooley, I believe you said, did you complain to anyone about the cutting?

A. Well, I just didn't complain to anybody; only my lawyer.

[fol. 19] Q. Who was your lawyer?

A. Lawyer Ackerman at that time.

Q. Did he do anything about it?

A. He said he would take care of it. He was going to St. George the next day and he would look into it and see about it.

Q. Nothing was done?

A. No, sir, not by him. I got into a wreck and liked to have got killed. I never could get him to do nothing, so I employed Mr. Unger, of the firm of Jefferies, McLeod and Unger, after Mr. Ackerman.

Q. And all during this period from, I think you said 1920, when you got the deed from your mother

A. Yes, sir.

Q. Up to the present time you would go on it, from time to time, but other than that you didn't do anything else but just hunt on it occasionally?

A. No.

Q. And during the time of this cutting, when it was going on you weren't doing anything with the property at all, were you?

A. I wasn't doing nothing with it?

Q. You weren't farming it?

A. No, you couldn't farm it.

Q. You weren't living on it?

A. No, sir.

Q. You didn't have a fence around it?

A. No, sir.

Q. You didn't have it posted?

A. No, sir. My father never did post his own.

Q. You didn't have it posted?

A. No, sir.

[fol. 20] Q. You weren't going on it except occasionally during hunting season, is that correct?

A. After I moved away from there I didn't do nothing.

Q. During this time it was being cut and just prior to that?

A. No, sir.

Q. Did you testify you were born near this property? Did I understand you to say that?

A. Born where?

Q. Nearby where this property is.

A. Yes, sir, right close.

Q. Isn't the house in which your father lived probably,

where you were born, just a short distance West of this bank?

A. Yes, sir.

Q. It runs along the Western border?

A. Yes, sir.

Q. When did you move away from there?

A. I moved from there in 1912, around to Delmas.

Q. You have been living there since then?

A. No, but I did go back to my father's, not so far from there, Delmas' crossroads.

Q. How long have you been living there?

A. From 1912 to 1923.

Q. And then where did you go?

A. To Ravenel.

Q. And you are living at Ravenel now?

A. Yes, sir.

Q. Since 1923 you have been living at Ravenel?

A. Yes, sir.

Q. That is in Charleston County?

[fol. 21] A. Yes, sir.

Q. How far is that from this property?

A. I reckon 15 miles. I used to go up and camp a week at the time and hunt and get wood and camp and hunt a week at the time.

Redirect-examination of A. N. Cone.

By Mr. Unger:

Q. Mr. Cone, you employed someone to go over this land and estimate the timber that was cut?

A. Yes, sir.

Q. You employed competent timber estimators, have you not?

A. Yes, sir.

Q. And you have talked to them?

A. Yes, sir.

Q. So you are not entirely guessing at how much timber was cut?

A. No, sir, I am not guessing. I will let them testify. I am no timber estimator; I can saw it up and you put it on the scale.

Q. When is the last time you were on this 106 acres since this dispute?

A. The last time?

Q. Yes, sir.

A. You know we were on it when we were estimating it there.

Q. Do you know about when that was?

A. A couple of months ago, wasn't it, I reckon it was two months ago.

[fol. 22] Q. What was the condition of your health at that time?

A. Bad. It is still bad.

Q. Were you able to go through the property?

A. No, sir, the doctor told me not to go through it. So I got these estimators. I got them to go and I stayed out at the corner.

Q. At this time I would like to introduce the tax certificates of the auditor.

Exhibit: We had an agreement the auditor's certificate would be sufficient. There is a jump from 1915 to 1921. It was admitted the auditor's certificate should be admitted as the reflection of the entries on the auditor's books. The plaintiff desires to introduce the auditor's certificate.

Objection by Waring: I object to this being introduced in that I object to the statements in (2) which do not indicate they reflect or have anything to do with this land. I didn't agree there should be an introduction of tax payments with regard to any other land.

The Court: I don't see where that is competent.

Mr. Unger: It is all in the chain of title. I understood in the pre-trial conference there was no need to bring in the auditor to prove any of this.

The Court: You have a tract in the name of Miles Cone, 385 acres.

Mr. Unger: He testified his father owned all of that.

Objection by Mr. Waring: No, he didn't and at this time I object and move all this be stricken out, it hasn't been proved.

The Court: I will admit that as a record of what the auditor's record shows. I will admit this one as to [fol. 23] the Cone Tract, 106 acres, and the rest of it, at this time subject to the later part of it being connected up.

Objection by Mr. Waring: I object to the introduction of the latter part as having no relevancy to this case.

The Court: Objection overruled, note an exception. Now, as to this other one, it is in Burns School District.

According to the records they changed the number, according to the auditor, School District 11 and School District 22 were the same. I will reserve my ruling on that.

Mr. Waring: We object on the ground it is irrelevant.

The Court: The first I admit; the second one I withhold because I don't see what it has to do with it. Maybe I can be shown.

Mr. Waring: This is a certificate by the County Auditor and I also note in the far column the notation "Paid." I have never seen that notation, I don't understand it.

The Court: If the County Auditor put it there, under his signature, I don't know how it got on the County Auditor's Books, but if he put it there you have agreed his certificate should reflect his books. You can argue to the jury if you wish to.

Exhibit: Auditor's Certificate, marked Exhibit No. P-D—May 14, 1945. This certificate shows 1944, Burns School District 22, A. N. Cone, 106½ acres, Paid. Is that the tract of land in controversy?

A. Yes, sir.

Q. It shows in 1943, 1942, 1941, 1940 on down to 1932— [fol. 24] Burns School District 22, the same return was made. In 1931 the certificate shows "Burns School District—Formerly No. 11 now No. 22, 106½ acres, Paid. Was there a change in the school districts?

A. Yes, sir.

Q. Prior to 1931 if was School District No. 11?

A. Yes, sir.

Q. And then the certificate shows 1929 on down to 1921, School District No. 11, A. N. Cone, 106½ acres. Is this listing the land in controversy?

A. Yes, sir.

Q. It shows in 1915, in Burns School District No. 11 that Miles Cone returned 385 acres of land. Was that Miles Cone your father?

A. Yes, sir.

Q. Do you know how many acres of land he owned in this School District?

A. I just go by what it says there, 385 acres.

Q. Was that all in one body.

A. Yes, sir.

Q. In 1916 it shows Burns School District No. 11, Miles Cone, 385 acres; and in 1917 Burns School District No. 11, Miles Cone 320 acres; and in 1918, 1919 and 1920, 320 acres. It dropped from 385 acres to 320 acres. It shows in 1917, Burns School District No. 11, Mrs. C. F. Cone, 55 acres. Do you know who she was?

A. She was my mother.

Q. In 1917, 1918, 1919 and 1920, Mrs. C. F. Cone, Burns School District No. 11, 55 acres in 1917, 50 acres in the remaining years; did your mother own any land in this School District other than this tract?

A. No, sir.

Q. In 1920 the certificate shows Mrs. C. F. Cone no [fol. 25] property, no real estate. When was this property deeded you by your mother?

A. In August, 1920.

Q. And you returned it in 1921?

A. Yes, sir.

Q. The other certificate is reserved. Does the West Virginia Pulp & Paper Co., own any land in Burns School District?

A. Yes, sir.

Q. How many sides of your tract?

A. On how many sides of this 106 acres?

Q. Yes, sir.

A. On three sides.

Q. Did Mr. J. Lamb Perry own any land adjoining this land?

A. On the North of this.

Q. Do you know what was the last year he owned any land on there?

A. I really don't. I think he sold out about 1923. I think that is the last time.

Q. Did your brother, I believe you said your brother, Owen, now owns the balance of your father's property joining this on the East.

A. Yes, sir.

Q. Has he ever made any claim to this 106 acres?

A. No, sir.

Recross-examination of A. N. Cone.

By Mr. Waring:

Q. Your mother in 1910 had a tract of 50 acres [fol. 26] from Charles H. Tumbleston?

A. I believe she had some land from Tumbleston, too.

Q. That has nothing to do with this property we are talking about?

A. No.

Q. In 1907 she got some from Ida Matilda Viard?

A. In when?

Q. In 1907.

A. I really don't know.

Q. She had other property that had nothing to do with this property at all?

A. No, sir.

Q. She returned for taxation, that was returned for taxation, she paid taxes on it? Now, this property which she conveyed to you by deed, she hadn't gotten any title from anyone else had she?

A. No, sir. No, I never question her as to what she had.

Q. You just got her to give you a deed?

A. I never questioned her as to her rights.

Q. You didn't know where she had gotten it, or where from, you just got her to give you a deed so that you could put it on the record?

A. The only thing she gave me the land.

Q. You wanted to get it on the record, you had a deed, that is why you got a deed from her?

A. Yes, sir.

Q. You pursuaded her to give you that deed?

A. No, sir.

Q. Did she say one day, "I want to give you some property?"

A. Yes, sir.

[fol. 27] Q. Anyhow you arranged between you, she should give you this deed and you put it on record, that was 1920 and as far as you know she had no title, you didn't know where she got it?

A. I didn't question her rights as to where she got it.

Q. You didn't know anything at all about it, before that.

Redirect-examination of A. N. Cone.

By Mr. Unger:

Q. What School District was this other land of your mother?

A. That was District No. 11; that was way up.

Q. State whether the name of that School District was "Collins"?

A. Yes, sir.

Q. Did that adjoin Burns School District?

A. Yes, sir.

Q. Did you ever ask your mother where is the deed to the property father gave you?

A. No, sir.

Recross-examination of A. N. Cone.

By Mr. Waring:

Q. They were all in School District 11?

A. They were all in No. 11 and later No. 22.

Q. They were all in No. 11?

A. And No. 13.

[fol. 28] Portion of the Direct Examination of John D. Harrison

Q. Did Mr. Miles Cone, in your presence, ever make any statements concerning the ownership of this 106 acres?

A. Yes, he said Mr. A. N. Cone owned it.

Objection by Mr. Waring: I object, that is hearsay.

The Court: I will let him say. Objection overruled. Exception noted.

Direct-examination of George Cooley.

By Mr. Unger:

Q. Where is your residence, Mr. Cooley?

A. Summerville.

Q. Were you president of the Carolina Logging Corporation in 1941?

A. I was.

Q. Is that company still in existence?

A. No, sir.

Q. What is your occupation?

A. I am a lumberman, and timber operator.

Q. How many years have you been engaged in such a business?

A. In South Carolina for 20 years.

Q. In 1941 state whether or not you cut any timber on 106 acres of land in Burns Township.

A. Yes, sir.

Q. For whom did you cut that timber?

[fol. 29] A. The Carolina Logging Corporation cut it and we cut it on a cutting contract with the West Virginia Pulp & Paper Co.

Q. Do you have a copy of that cutting contract?

A. Yes, sir.

Q. This is a duplicate of the agreement, your duplicate copy of the agreement?

A. Yes, sir.

Q. With the permission of counsel we are going to use a carbon copy which is being submitted in evidence by defendant's attorney.

The Court: Is there any objection—is there any question as to execution—do you wish the original?

Mr. Waring: No, your Honor, we have the original.

The Court: You are offering it in evidence now?

Mr. Unger: Yes, your Honor.

Exhibit: Plaintiff offers in evidence, as Exhibit No. P-F, cutting contract with the West Virginia Pulp & Paper Co.

Q. What is the date of that contract?

A. September 18, 1941.

Q. Is that Plat annexed to this contract the land that you cut?

A. It is.

Q. Do you know how long the operations continued on this cutting?

A. It was a sixty (60) day contract and my recollection is that it was finished up in that time.

Q. You were cutting for sixty (60) days?

A. Yes, sir.

Q. This title is lands of former J. Lamb Perry and Blackburn Hughes, do you have any recollection of how [fol. 30] much timber was cut off?

A. I do not.

Q. As president of the corporation those records were in your charge?

A. Yes, sir.

Q. What has become of them?

A. They were either lost or else filed so well I could not find them when I looked for them the other day.

Q. At that time you were employed under this contract by West Virginia Pulp & Paper Co.

Objection by Mr. Waring: He didn't say that.
The Court: The paper speaks for itself.

Q. Were any of the agents of the West Virginia Pulp & Paper Co., on this land under this cutting contract?
A. Yes, it was necessary, under the cutting, that an agent be there.
Q. Who measured the timber?
A. They did.
Q. How did you know what timber you were to cut, and how much you had cut?
A. Their agent scaled it.
Q. Would they send you a report?
A. Yes, sir.
Q. To whom did you pay for this timber?
A. West Virginia Pulp & Paper Co.
Q. Mr. Cooley, as a matter of fact the West Virginia Pulp & Paper Company's agent marked this 106-acre tract off, did they not?
A. Yes, sir.
Q. Did you go on the land during the cutting?
[fol. 31] A: Yes, sir.
Q. They have a yellow X-mark they put on the trees?
A. It was well marked, yes, sir.
Q. Would you say there was at least one million feet of timber cut off there?

The Court: That isn't a proper question; if he doesn't know, let him say he doesn't know.

Q. This contract provides, Mr. Cooley, that you were to cut 300,000 feet of timber every two weeks, is that correct?
A. That is correct.
Q. (Reading from contract) "Payment for the timber cut, as herein provided, shall be based on the measurement of the First Party," that is the West Virginia Pulp & Paper Company?
A. Yes, sir.

Cross-examination of George Cooley.

By Mr. Waring:

Q. Mr. Cooley, you said that the Carolina Logging Corporation cut this timber in September, 1941?

A. That is right; that is when they started.

Q. And you did that under a sale to the Carolina Logging Company by the West Virginia Pulp & Paper Company?

A. Yes, sir, that is right.

Q. When you went there in September, 1941, the agents of the West Virginia Pulp & Paper Company were in charge of the property?

A. They were.

[fol. 32] Q. And they were around there when you were there during the cutting, while the Carolina Logging Company did the cutting?

A. Yes.

Q. And they directed what was to be cut, is that correct?

A. They did.

Q. So that they were exercising possession at that time, were they not?

A. Very much so.

Q. Now, during September, 1941, did the West Virginia Pulp & Paper Company cut any of that timber?

A. No, sir.

Q. The only cutting that was done was done by the Carolina Logging Corporation?

A. That is right.

Q. And the Carolina Logging Corporation, did it manufacture it into lumber?

A. No, sir.

Q. They sold it for manufacture into lumber?

A. Yes, sir, they sold it to other people.

Q. And the Carolina Logging Corp. was the one that cut and removed that timber?

A. They did.

Q. At this same time, Mr. Cooley, were you cutting other timber on other lands of the West Virginia Pulp & Paper Co.?

A. I was. I had quite a number of cutting contracts with the West Virginia Pulp & Paper Company and

there was a contract, it was in the nature of a sub-contract on this Perry-Hughes timber, under which I bought the hardwood timber and another party had [fol. 33] bought both pine and hardwood, and I cut this hardwood portion of it on this sub-contract on the West Virginia Pulp & Paper Company.

Q. That was on the Lamb-Perry Tract?

A. I knew it as Perry-Hughes, the tract just North of this.

Q. I think, Mr. Cooley, there was a plat attached.

The Court: Is that plat supposed to go in?

Mr. Waring: It does have a plat.

Mr. Unger: I want the plat attached to the exhibit as a part of the copy.

Mr. Brockinton: Let the original stay in then.

The Court: Mark the original in evidence and cancel it on this copy.

Q. There is a plat attached to that contract, is there not?

A. Yes, sir.

Q. 106 acres?

A. Yes, sir.

Q. Would you look at this plat and see whether you can identify the same property on that plat (referring to plat—exhibit No. D-1) for identification?

A. This portion here is quite obviously marked "part of Waring."

Q. And that is the same as the tract referred to on the small plat, is it not?

A. Yes, I am sure that it is. This is the highway running through here.

Q. Mr. Cooley, referring to this large composite plat, whatever you would like to call it, can you tell from that where there is a canal in relation to that property?

A. It is marked on there. This Northern line, that [fol. 34] canal, that starts off of the property to the Northeast and runs across the end of this and on West for about the equal distance as across the end of the property.

Q. Does the canal run along the Northern boundary of what is indicated here as "W. N. Cone" property?

A. It does.

Q. And across the property marked "Part of Waring," which is in dispute, and continues on along the Northern boundary of lands of "Miles Cone"? And that is the same canal?

A. That is one of the boundaries of this property, yes, sir.

Q. I refer you to the Western boundary, identified as "Part of Waring," do you know what that Western boundary is?

A. A bank along this line.

Q. Do you know if there are any fire lines?

A. Yes, sir, there is a fire line on the inside of that bank.

Q. And there was at the time?

The Court: The "inside" means East or West side?

A. On the east side.

Q. You mean within the area of the disputed property?

A. Yes, sir.

Q. There is a fire line?

A. Yes, sir.

Q. And there was at the time this cutting was in progress.

A. Yes, and it had been there some time.

Q. Did you notice any posting there, whether it was posted?

[fol. 35] A. Yes, sir, it was posted; West Virginia Pulp & Paper Company had their signs on the lines of that area.

Redirect-examination of George Cooley.

By Mr. Unger:

Q. What kind of timber was it; had it been cut over before?

A. No, sir.

Q. It was virgin timber?

A. It was original growth pine, mixed with hardwoods and some cypress.

Q. Many poles?

A. Yes, sir, quite a few cypress poles were taken off that land, yes, sir.

Q. Were there any cleared areas on it at all?

A. No, sir.

Q. It was all heavily timbered?
A. Yes, sir.
Q. Now, Mr. Waring has referred you to a composite plat here on which you have identified this small tract as "part of Waring"—that lies to the South of the canal?
A. Yes, sir.
Q. And the Waring tract is to the North of that canal?
A. Yes, sir.
Q. The Waring tract, 868 acres on this plat, is that correct?
A. That is right.
[fol. 36] Q. Do you know what township this is in?
A. No, sir.
Q. You don't know anything about the ownership of this 106 acres?
A. The ownership?
Q. Yes?
A. The West Virginia Pulp & Paper Company, I hope.

Recross-examination of George Cooley:

By Mr. Waring:

Q. You have every reason to believe it is theirs?
A. I certainly do, yes, sir.
Q. Refer again to "Composite Plat" of what is marked "Waring" (referring to Exhibit D-1, for identification). The area referred to here as the "Waring tract" would include this as a part of it, would it not?
A. Yes, sir, that is right.

Direct-examination of Owen Cone.

By Mr. Unger:

Q. Mr. Cone, what relation are you to Mr. A. N. Cone?
A. Brother.
Q. Where do you live?
[fol. 37] A. Cottageville.
Q. Are you also a son of Miles Cone?
A. Yes, sir.
Q. At present, state whether or not at present, you own the estate of Miles Cone, the estate lands?
A. What estate I own of his?
Q. What part of the estate do you own?

A. I own the old homestead or all the land he had left after this was deeded to my mother.

Q. How much land is there left, how many acres?

A. 320 acres, I think, was the homestead.

Q. Are you familiar with this 106-acre tract?

A. Yes, sir.

Q. Do you have any knowledge of any possession your father had of this land prior to his death?

A. Yes, sir.

Q. Do you have any knowledge of possession that your mother may have had to this land?

A. Not only he deeded it to her.

Q. When?

A. About 1917.

Objection by Mr. Waring: Your Honor, we object to this testimony, too.

The Court: He says it was a written deed, you said he deeded it to her; did you ever see the deed?

A. No, sir, I didn't ever see the deed.

Q. Was there any family talk about the matter?

Objection by Mr. Waring: I object to that, your Honor.

The Court: The deed is the best evidence; produce the deed.

Q. What kind of timber was this, on this land?

[fol. 38] A. It was good timber on it, pine timber and hardwood timber and all. It was the original growth.

Q. Julia Anne Driggers lives on your place; you join this tract on the East?

A. Right.

Q. Did you have occasion to go across this property at anytime recently?

A. Not recently, I haven't.

Q. About a month or so ago?

A. About a month or so ago I went over it.

Q. You went over this land; did you see any landmarks in there?

A. Yes, sir, there were cross-marks on the trees, yellow marks.

Q. I hand you a plat here, marked Exhibit No. P-B of 106 acres, where were those marks just turn so the jury could see, where were the cross-marks on the trees that you saw?

A. All the way around, all along the canal, dam, they went down to the other dam and went on across.

Q. Around all four sides of it?

A. Yes, sir.

Q. Did you see any posts in the canal at the corner of your lands and the Perry lands?

A. Yes, sir.

Q. Did you see any lightwood knot and cypress witness, as shown on this plat?

A. Yes, sir.

Q. Is there a bank along this line?

A. Yes, sir, that is on the South side.

Q. That would be the East.

A. I meant to say the East side, yes, sir, there is an [fol. 39] embankment along there.

Q. Did you find a large pine tree here as shown on this plat?

A. Yes, sir.

Q. Did you find the lightwood knot on the bank here, as shown on this plat?

A. Yes, sir.

Q. Did you find a line oak here, as shown here, a stake on the end of the bank?

A. Yes, sir.

Q. Is that live oak—I guess that is a live oak—do you know, Mr. Cone, from your knowledge, in your lifetime, where the John Cone line was?

A. Yes, sir.

Q. Where was John Cone's property, where did it come to?

A. I joined mine a little on the Southeast.

Q. Do you know where it is in relation to this 106 acres?

A. No, sir.

Q. Is this 106 acres, was it ever a part of the John Cone or Sarah Cone property?

A. No, sir.

Q. Do you claim any interest in this 106 acres?

A. No, sir.

Q. Do you know any other land, in Burns School District, your mother owned outside of this 106 acres?

A. No, sir.

[fol. 40] Cross-examination of Owen Cone.

By Mr. Waring:

Q. Mr. Cone, referring again to this plat, which is Exhibit No. P-B, there is a bank here on the West side of this property, is there not?

A. Yes, sir, a bank here.

Q. And that divides it from what was formerly Miles Cone's property, your father's property, now your property?

A. Yes, sir.

Q. There is a bank along here?

A. Yes, sir.

Q. And just near the bank there is a fire line, is there not?

A. I never saw the fire line.

Q. Have you been on this property recently?

A. I was on it about one month ago.

Q. You didn't see it, you wouldn't say there wasn't one?

A. No, I wouldn't say there wasn't one.

Q. There may be?

A. There may be.

Q. Now, just South of this property was the property known as Sarah Cone, was it not?

A. That is right, South of this disputed property.

Q. And Sarah Cone was the widow of John Cone.

A. Right.

Q. And he was your uncle?

A. That is right.

Q. So that the property just below it, sometime was owned by your Aunt Sarah, by marriage?

[fol. 41] A. Yes, South of mine.

Q. South of the disputed property, you mean?

A. Yes, sir.

Q. And Southwest of your property?

A. Yes, sir.

Q. It does border your property, doesn't it?

A. A little corner, yes, some of her's borders mine.

Q. Now, Mr. Cone, you say you have 320 acres, that the tract you have is 320 acres that you got from your father?

A. Yes.

Q. And he had, of course, just that same quantity of property before you, did he not, did he deed it to you?

A. Yes, sir, he deeded it to me.
Q. That was all he had in that area?
A. At that time, that was all he had.
Q. That is all in Burns Township that he had?
A. No, sir.
Q. Did he have some more?
A. He owned out East of mine that he deeded to my mother. He turned it over to my mother.
Q. In any event, Mr. Cone, what I intended to ask you was this, in 1917 do you know whether that was School District No. 11, Burns School District No. 11?
A. I am most sure it was.
Q. And also the disputed property was in Burns School District No. 11?
A. I think it was No. 11.
Q. In 1917, 1918, 1919 and 1920, is that correct?
A. Yes, sir.
Q. Mr. Cone, when did your mother die, what year, do you remember?
[fol. 42] A. In 1924.
Q. And when did your father die?
A. In 1941.
Q. And it was before your father's death that he deeded you this property, it wasn't left to you, it was deeded to you?
A. In fact, I bought out the share of the other boys.
Q. Prior to your father's death you bought out their shares?
A. Yes, sir.

Portion of Direct Examination of Hill B. Beach

By Mr. Waring:

Q. Where do you live?
A. Walterboro, Colleton County.
Q. By whom are you employed?
A. At present?
Q. Yes.
A. The Health Department of Colleton County.
Q. And how long have you been so employed?
A. With this Department?
Q. Yes.
A. Oh, just three or four months.
Q. And before that by whom were you employed?

A. At the Naval Air Station, Beaufort, S. C.

Q. Before that by whom were you employed?

A. I was over at James Island Civil Air Patrol Base over there.

Q. And prior to that time?

[fol. 43] A. West Virginia Pulp & Paper Company.

Q. When did you leave the employ of the West Virginia Pulp & Paper Company?

A. In March, 1942.

Q. When did you begin work with them?

A. February 1st of 1926.

Q. February 1, 1926, to March, 1942, you were with them?

A. Yes, sir.

Q. You were in the employ of West Virginia Pulp & Paper Company?

A. Yes, sir.

Q. What were your duties, generally.

A. Well, superintendent of the woodland for them.

Q. In what area?

A. Charleston and Dorchester Counties, and the East portion of Charleston and Dorchester.

Q. Mr. Beach, have you heard the testimony in regard to the disputed area in this action?

A. Yes, sir.

Q. Did that land come within your supervision, did it come under your supervision?

A. Yes, sir.

Q Did the so-called Perry lands, Perry-Hughes lands, come under your supervision?

A. That is what I knew it as, Perry-Hughes.

Q. Do you recollect this 106 acres you know that property?

A. Yes, sir.

Q. Can you identify it on a plat (handing witness a plat) this is Exhibit No. D-1.

A. Have you got a blue print, I believe I could see [fol. 44] it better than I could on this one here.

Q. (Giving witness a blue print, copy of Ex. No. D-1.)

A. There it is.

Q. Would you identify that to the jury?

The Court: How is it marked?

Q. Describe how it is marked on the plat?

A. There is the disputed area there, it is marked with a bank on this side, and this side, and this side.

Q. How is it described on the plat?

A. How do you mean, sir?

Q. What is it named on the plat?

A. This particular plat, the Perry tract.

Q. On the plat what is it called?

Mr. Unger Objects: He answered what it was, he said it was the "Perry tract."

Q. I ask him to put his finger on the particular tract of land and if there are any words there to read them?

A. There is the particular tract.

Q. What is the marking on that, what does it say?

A. I can't see that so well, sir. "Part of Waring."

Q. Would you describe the marks on the ground around there that you know of?

A. Well, now I never have, I never did pay much attention to the marks on that side.

Q. That is on the East side?

A. This here was once the Cone, the Sarah Cone tract owned by Fred Goodwine and I noticed the markings on there but on this side, over here, I never did notice any markings over there only on this dam here, and on the Sarah Cone tracts.

Q. Did you notice any markings on the West side of the disputed property?

[fol. 45] A. Yes.

Q. On the West side of the disputed property, do you recollect anything on that side?

A. There was a mark and a dam coming through there.

Q. Now, Mr. Beach, during the time that you had charge of this property, would you tell me—first I will ask you was the property ever fenced while you had charge of it?

A. No, sir.

Q. Was it cultivated?

A. No, sir.

Q. What did you do what did your supervision consist of with the property?

A. Well, it consisted of trying to protect it against forest fires and poachers.

Q. Just to ride it generally and see what condition was there and see if anyone was poaching on it?

A. Yes, sir.

Q. Did you ever find any poachers on it?

A. No, sir, not to my knowledge.

Q. Did you ever see Mr. Andrew Cone on that property?

A. No, sir, not to my knowledge, I never did see him.

Q. You frequently went there?

A. Well, yes, sir.

Q. And from 1924 to 1942.

A. (Interrupting) From 1926.

Q. From 1926 to 1942 you never saw Mr. Andrew Cone on the property?

A. No, sir, I don't recollect ever seeing him on there.

Q. Did he ever tell you it was his property?

[fol. 46] A. No, sir.

Q. Did he ever assert ownership in any way as far as you know?

A. Not that I know of.

Q. Do you recollect, Mr. Beach, whether that property was posted by West Virginia Pulp & Paper Co.?

A. It was, yes, sir.

Q. Did you see to that?

A. Yes, sir.

Q. And when did you have it posted?

A. Well, it was posted when I went to the company in 1926.

Q. And your company had it posted when you first took charge?

A. Yes, sir.

Q. And you kept that posting up?

A. Yes, sir, very often we re-posted it.

Q. Did you ever exercise any other ownership or use in the property for the company?

A. Well, only protecting it against forest fires.

Q. What did you do for that?

A. There was a fire line put around it.

Q. A fire line?

A. A fire line, you might call it.

Q. Now, Mr. Beach, would you show on that map where your line, where you ran your fire line in relation to the Perry properties?

A. Well,

Q. I will ask you this question first, what is your practice in running fire lines?

A. You mean, to make the use of those lines we run them on the boundary line of the properties.

[fol. 47] The Court: Ask him what he does to make a fire line.

A. We clear the boundary line between the properties and plow that with a tractor and plow and then we go over on the property about 100 feet and clear it and plow it out and we burn in between those plowed lines.

Q. You have an area about 100 feet wide?

A. Yes, sir.

Q. Looking at the map will you show approximately where a fire line was run with regard to the Perry properties?

A. It was cut pretty well over the boundary line between Mr. Cone's property and other properties in the vicinity. This line here was plowed, it was cleared off up to Mr. Miles Cone here and on around his property.

Direct-examination of Howell Bivens.

By Mr. Waring:

Q. Mr. Bivens, where are you now employed?

A. Charleston Navy Yard.

Q. Where did you formerly work?

A. With the West Virginia Pulp & Paper Company.

Q. How long did you work with them?

A. I started in 1925 and worked to 1943.

Q. During that time did you ever have occasion to supervise the Perry-Hughes property for the company?

A. I have been on the property several times.

Q. You are familiar with the property?

A. Yes, sir.

[fol. 48] Q. Could you show on this plat, come before the jury (witness comes in front of the jury-box) please, the disputed property in this case?

A. Yes, sir, there it is right there.

Q. During the time that you supervised or had charge in any respect of this property did you ever see Andrew Cone on that property?

A. I never did.

Q. Did you ever hear of him making any claim to that property?

A. No, sir.

Q. Did he ever do anything on the property to indicate he owned it?

A. Not to my knowings.
Q. Did he build any fence?
A. Not that I saw.
Q. Did he clear any fields?
A. No, sir.
Q. Did he cut any timber?
A. No, sir.
Q. You went frequently on the property?
A. No, sir, I didn't go very often, whenever we had a forest fire I would go down in there and fight the fire.
Q. When you went with the company in 1925 did you have the property under your personal charge?
A. Right.
Q. And it was so until Mr. Beach took over?
A. And then I helped Mr. Beach if he had a forest fire on it why me and him took care of it together.
Q. Now, Mr. Bivens, do you recollect any fire lines being run on that property?
A. Yes, sir, there was a fire line, the CC boys cut that.
[fol. 49] Q. When was it put there?
A. I don't just exactly know when it was put there—I couldn't tell you.
Q. Show where that line is in relation to the map?
A. It is on that, coming down that bank next between Cone and the disputed property, called the disputed property, right there, I think the fire line is there around Cone.
Q. Between Cone and the disputed property. Come and show these other gentlemen where you cut it.
A. (Pointing) right there.
Q. Between what property is that bank running on the map?
A. Between Miles Cone.
Q. And what is the disputed property called?
A. "Part of Waring."
Q. And the bank runs between those two that you refer to?
A. Yes, sir.
Q. And where did the fire line run?
A. Right down that bank.
Q. Which side of the bank?
A. On the West side.
Q. The West side of the bank?
A. Well, it is on that side of the bank, that is the line,

it would be on the outside of the line, see what I mean, it would be on the East side.

Q. It would be on the East side of the bank?

A. Yes, sir.

Q. Will you show these gentlemen here which side of the bank the fire line ran?

A. That is the bank right there, it would be here.

[fol. 50] Q. Between what property?

A. Between Miles Cone and the Waring tract, "Part of Waring."

Q. South of that disputed property what property lies?

A. Cone.

Q. What is it called, do you know?

A. S. E. Cone.

Q. When this fire line was run do you know whether or not that property was owned by the company?

A. The Waring property?

Q. No, the S. E. Cone?

A. I don't recall that.

Portion of the Direct Examination of F. C. Hills.

By Mr. Waring:

Q. Mr. Hills, what is your business—what business are you in?

A. I am a timber cruiser and buyer for a lumber company.

Q. And how are you employed now?

A. I am employed as a timber cruiser and buyer.

Q. By whom?

A. Flat Inch Lumber Co., at Ridgeville.

Q. By whom were you employed in 1941?

A. Carolina Logging Corporation, in 1941.

Q. Did you take any part in the cutting which occurred September, 1941, on this disputed property?

A. Yes, I was cutting down there. I was in charge [fol. 51], of the cutting down there.

Q. This company of which Mr. Cooley was the head? Mr. Cooley testified here, he spoke of it as his company, was that right?

A. That is right.

Q. Step down to the jury. Can you identify on this plat the disputed property (using Ex. No. D-1)?

A. That is it right there, "Part of Waring."

Q. Were you at the same time doing any other cutting on the Perry lands?

A. No.

Q. You were superintending only the cutting on this, that is all you had charge of?

A. Yes.

Q. Do you recollect any fire lines that existed there at the time?

A. Yes, sir, there was a fire line down just inside of this West bank.

Q. And what property is named on the other side of that bank?

A. It was known as Cone Property, I don't know what Cone, I only knew it as Cone property.

Q. Do you recollect if the property was posted?

A. Yes, it was posted along this bank and along this line here, the South and West line were posted.

Q. By whom?

A. West Virginia Pulp & Paper Company.

Q. Now, when you were on that, when you went on that property, when you went on that property to do your cutting, who was in charge of the property?

A. (Thinking) You mean in reference to the cutting or——

[fol. 52] Q. You said you were in charge of the cutting, who was in charge of the property?

A. The nearest wood rider to it was Tommy Bivens, about a mile or two across the woods and he came by right often.

Q. He was a wood rider for who?

A. West Virginia Pulp & Paper Co.

Q. He came there frequently?

A. Yes, sir.

Q. Do you know from what company the Carolina Logging Corporation purchased this timber?

A. From the West Virginia Pulp & Paper Co.

Q. And this cutting was done under your supervision on behalf of the Carolina Logging Corporation?

A. Right.

Direct-examination of Tom Peeples.

By Mr. Waring:

Q. What is your name?
A. Tom Peeples.
Q. By whom are you employed?
A. West Virginia Pulp & Paper Co.
Q. You are now employed by them?
A. Yes, sir.
Q. How long have you been in their employ?
A. About eight (8) years.
Q. What do you do, Mr. Peeples, what are your duties?
A. I am caretaker for West Virginia Pulp & Paper Co.
[fol. 53] Q. You are caretaker of their lands?
A. Yes, sir.
Q. Now, you have heard the testimony about this disputed land, is that part of the land you look after?
A. Yes, sir.
Q. You look after the Perry lands, down there?
A. Yes, sir.
Q. You live nearby?
A. Yes.
Q. You know where that disputed land is on this map?
A. I believe I do, yes, sir.
Q. I wonder if you could point it out to the jury?
A. (Pointing on map.)
Q. Right there, what is it marked on the map, what is it called on the map?
A. Perry-Hughes.
Q. No, the disputed part, what is it called on the map?
A. Perry-Hughes.
Q. You know it on the ground?
A. Yes, sir, I do.
Q. Do you know when—were you with the company in September, 1941?
A. Yes, sir.
Q. You were around, were you around this property at this time?
A. Yes, sir.
Q. Do you remember any cutting going on on the disputed land?
A. Yes, sir.
Q. And who was cutting that timber?

A. Mr. George Cooley and Mr. Hills were out there, sir.

[fol. 54] Q. Mr. Hills was director there?

A. Yes, sir.

Q. You saw him there? Now, Mr. Peeples, how often do you go around this property?

A. I would say once a week, an average.

Q. Very frequently?

A. Yes, sir.

Q. What generally are you supposed to do?

A. Look out for hunters, sir, and see that nobody don't take anything off the lands.

Q. Anything else?

A. I believe that would be all.

Q. And what about fire?

A. Look out for fire.

Q. Do you help with the fire lines?

A. Yes, sir.

Q. Do you know whether or not a fire line is on this disputed property?

A. Yes, sir, it goes right down an old dam.

Q. The dam between what property?

A. Between Cone and West Virginia.

Q. Right along a dam?

A. Yes, sir.

Q. Do you ever remember during the 8 years you have been around there, Andrew Cone coming on that property?

A. No, sir.

Q. Have you ever seen him on it?

A. No, sir.

Q. Have you ever seen him around it?

A. No, sir.

Q. Has he any plowed fields on that property?

[fol. 55] A. No, sir.

Q. Has he ever built any fences?

A. No, sir

Q. Are there any fences?

A. No, sir.

Q. Is there any house on it?

A. No, sir.

Q. Have you ever seen him gathering wood on it?

A. No, sir.

Q. Or anything else around that property?

A. No, sir.

Q. Do you know what Cone that is, that this bank is by, what Cone is that?

A. What Cone the bank boundaries? Miles Cone used to own it and I think Mr. Rufus Cone, I think—I can point him out.

Q. Point him out.

A. (Pointing in the courtroom) That gentleman right back there, I think he owns the Miles Cone place.

Q. Which one?

A. The gentleman with the dark suit on, sitting side of Mr. Dan Cone.

Q. Stand up.

A. (The wrong man stands up) No, sir, the gentleman on the end, I think he owns the Miles Cone property.

Q. That one?

A. Yes, sir.

The Court: He is the one who testified yesterday?

A. Yes, sir.

Q. He is the one who now owns the property you are talking about?

A. The Miles Cone property, not the disputed property. [fol. 56] Q. That is the property that lines alongside this bank you spoke of, where the fireline is run?

A. Yes, sir.

DEFENDANT'S MOTION TO DISMISS

Mr. Waring: If it pleases your Honor, at this time the defendant wishes to make a motion.

The Court: Let the jury go to their room (the jury retires). Your motion is for a direction of verdict?

Mr. Waring: It is a motion to dismiss, under rule 41-B, voluntary dismissal. We move to dismiss on three different grounds:

1. The plaintiff has failed to prove that he has title to the property.

2. The plaintiff has failed to prove that he had possession of the property at the time of the alleged trespass.

3. That the plaintiff has failed to prove that the defendant, in September, 1941, cut, removed and sold the timber alleged to have been cut.

COURT'S RULING ON MOTION TO DISMISS

The Court: (After argument) Doesn't Mr. Cooley testify the West Virginia Pulp & Paper Company took him there and told him there is where he can cut. Suppose I took Mr. Cooley down to your house and point him out to your house and point out your dining room furniture and tell him take it out and sell it—do you think that shows him in possession of it?

[fol. 57] I don't think the plaintiff has put up very strong possession testimony but he said he had been on and off the property for a great many years.

(After further argument by Mr. Waring on the three grounds.)

I shall refuse the motion.

DEFENDANT'S MOTION TO STRIKE

I would like to move to strike all of the testimony pertaining to the back title. I will refer to it as that, for convenience, in that there has been no linking up by the plaintiff with the deed, I believe it was from A. Miles Cone to Miles Cone.

THE COURT'S RULING ON MOTION TO STRIKE

The Court: I think that is a matter for the jury to pass on. I don't think there is much evidence of title here but I will let the jury pass on it. Motion overruled. Exception allowed.

DEFENDANT'S MOTION TO STRIKE

I also move to strike out all evidence of any title or semblance of title, prior to Caroline Cone, going into this record.

[fol. 58] THE COURT'S RULING ON MOTION TO STRIKE

The Court: Motion also refused. Exception is noted and allowed.

MOTION BY DEFENDANT FOR DIRECTION OF VERDICT

Motion by Mr. Waring: (Jury out) If your Honor please, our motion is for a direction of verdict on the ground that there can be but one reasonable conclusion

from the evidence and that is that the judgment should be for the defendant. The motion is based somewhat on the same argument that was presented to your Honor on the motion to dismiss. The proof deduced by the defendant, we feel substantiates title conclusively in this land in the defendant and not in the plaintiff, as he attempted to show.

REMARKS BY THE COURT

The Court: (After argument) The fact that your outline of the testimony is good jury argument, and I confess that I have seen not very strong evidence of possession, but there is testimony that that was the property of Mr. Cone; they have put in evidence deeds, they have put in evidence some testimony as to the lines, and plaintiff, himself, says he frequently went on there. Whether you believe him or not that is not for me to pass on.

[fol. 59] Mr. Waring: He put in the deed from Caroline Cone to himself.

The Court: And he said he went on there and cut some boards, and hunted, and he had other testimony there of other people that said it was his land. (After argument by Mr. Waring as to showing of possession of this property in September, 1941.)

He doesn't have to show possession that month. Suppose he had proven he was there in June or July, the West Va. Pulp & Paper Company shows it had very slight possession, its own riders said they would go in there very infrequently. We know, it is true, none of the lands like this are occupied from day to day. I suppose that land went six months without anybody walking across it. They went in there, the plaintiff says the West Va. Pulp & Paper Company went in there without a right. You can't make an illegal entry and then say you are in possession. That is his argument, he says it is an illegal entry. That is his argument, I don't say that.

COMPLETION OF DEFENDANT'S MOTION FOR DIRECTION OF VERDICT

Mr. Waring: The other part of the motion then is just as it was made yesterday, that there has been no showing

that the West Va. Pulp & Paper Company did any cutting on this property. As I stated to your Honor yesterday it was stated by all of the witnesses, who testified, theirs and ours, that the cutting was done by the Carolina Logging Corporation, and the cutting, removing, and selling was all done by that corporation. [fol. 60] The West Va. Pulp & Paper Company had absolutely nothing to do with it. And there is no allegation in the complaint which would sustain a recovery against West Va. Pulp & Paper Company on the basis of the evidence given, because there has been no element of proof offered to sustain the proposition that West Va. Pulp & Paper Company cut, removed, or destroyed anything on the property.

COURT'S RULING ON MOTION FOR DIRECTION OF VERDICT

The Court: I passed on the proposition yesterday. If I was wrong yesterday I am wrong today. I think this is a jury question. I am not going to discuss how strong or how weak it may be, it is not necessary for me to do that. It is an issue of fact. Motion refused. I assume Mr. Waring notes an exception.

CHARGE TO JURY

Mr. Foreman and gentlemen of the jury, we now come to the final stage of this cause, the most important one, the decision by the jury. In our American courts, in the controversy of this case the plaintiff or claimant files what he calls his complaint. In this case it is an amended complaint. The first complaint didn't have the land described exactly and on motion it was decided to allow an amended one and the defendant answers and files a written paper, called the answer. And those make up the issues to be tried by the court and the jury. [fol. 61] Now, when the case comes to an actual trial, the attorneys present to you their views, they call witnesses, they examine the witnesses, and cross examine the witnesses, and they do their best to elicit what are the real facts in connection with the matter. The judge's province in the case is to preside, to preserve order in the court, to rule upon questions of evidence to be admitted, that he thinks are pertinent or not pertinent and to ex-

plain to the jury what the issues are and what law applies; and then, gentlemen, you go to your jury room and you decide what is the truth, you decide the facts and you bring in a verdict. In this court the presiding judge has a right to discuss the facts and to indicate to you views he may have in regard to them, and if in the course of my charge I should indicate any views that I have on the facts you have a right, if you wish, to make use of them. You are not in any way bound by them, you are the sole judges of the facts.

In this case the plaintiff, A. N. or Andrew N. Cone, brings his action against West Virginia Pulp and Paper Company, which is a corporation which owns property in this State, and says that the company through its agents and servants entered upon this tract, described as one hundred six and one-half (106½) acres, and definitely described by metes and bounds in this complaint; that they entered upon it, cut timber and took it away; that it was his land, his timber; that it was an unlawful entry, it was a trespass and they ask damages in the sum of Twenty-five thousand ($25,000.00) Dollars.

I charge you, gentlemen, that there is no evidence in this case that there was any malicious entry. Under the [fol. 62] laws of this State you can sue for actual damages and for punitive or exemplary damages where there is evidence that one has maliciously and with evil mind come in and taken something away from you or broken in, over your objection, as in this case there is nothing of that kind, you are not warranted in finding exemplary damages.

Your consideration of the case is whose property was it, whose timber was it, and whether or not the West Virginia Pulp and Paper Company had the right to enter there and cut and whether it was a lawful entry or whether they entered upon the land of Cone and took the timber away. If you find the lands were Mr. Cone's you must find the damage to him and assess that in money. It is a pure and simple business matter. There is not sentimental matter in this case, it is a simple business matter, who owned the land, who owned the trees on the land. If you find the West Virginia Pulp and Paper Company owned it, they had a right to take it away, and you should find for the defendant. If Mr. Cone owned it, you should find such amount as you find he was damaged—the value of what they took away from him.

Now, gentlemen, in this case each side has claimed title and each side has put in deeds of title, deeds, written papers by which each attempts to trace his or its title down to the present date. I charge you that it is impossible in this case to go back to an actual grant by the Government, by the State, or before that time by the King of Great Britain, (a great many of these titles go back to the grant of the King) for the public records were destroyed in 1865 in Colleton [fol. 63] County when the Northern armies came through—those records there and in Columbia were destroyed. We can't trace deeds back of 1865 in Colleton County. You might find a deed written in another county or where somebody has a deed not recorded, but ordinarily you find nothing back of 1865. Each of these parties traces title of some kind. Each has criticized the other's title to lands, and descriptions and boundaries. All those are matters for you. I charge you, gentlemen, that in deciding as to title, in locating the lands, generally speaking these are the rules—the most important item, natural boundaries where you can find a river bank, sea-shore or some natural boundary or ravine. That is the highest evidence of a boundary. After that, and there are none of those here—artificial marks, monuments, blazes, banks, cuts, pipes, markers, stakes or anything else used to indicate the line. Then, after that we consider the adjacent boundaries, that is that a property is bounded on the North, East, South, or West by lands of A, B, C, or D; and after that the course and distances, and last of all, the amount of land said to be enclosed within the description. As our South Carolina Supreme Court has said in one of its cases, "that ordinarily one of the lowest in the scale of importance is the acreage given therein," though it is one of the measures and one of the items that you will have a right to consider.

In addition to the actual title that each claims, each claims possession, and I say to you, gentlemen, that your duties in this case are somewhat lightened by the fact that that is the somewhat more important item here, for after all, a suit for trespass means an unlawful or improper entry [fol. 64] on the lawful possession of another, and each side claims that he or it was in lawful possession of the land and you must consider the testimony, particularly in regard to those matters.

Now, I have been asked to charge you that under the law

of this State an adverse possession, that means possession held against a titled owner, adverse possession (Reading from Code of 1942, Vol. 1, Section 379) "Any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases.

"(1) Where it has been usually cultivated or improved."

Gentlemen, that doesn't apply here in this case. It was the testimony there was no arable land, and it wasn't cultivated.

"(2) Where it has been protected by a substantial enclosure." All parties agree there was no fence.

"(3) Where, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purpose of husbandry, or the ordinary use of the occupant."

Now, gentlemen, each side claims to have been in possession; each side claims to have been in lawful possession, and I think that is the most important thing you have to decide because each side claims it had legal title and possession was based upon legal title and if you should find one side was in possession and the other side was not in possession that would be your verdict in this case.

Now, then, for the plaintiff, Cone, there was testimony of certain witnesses that the lines were there, the canal was spoken of as the line separating it from the Waring or Perry tract of land. There was testimony the former [fol. 65] owner, Mr. Lamb Perry, said that canal was the line, "you mustn't go across it." You can give due weight to that because the rule is that lines can be proven by common hearsay and understanding in the community. Very often that is the only way they can be proven, and there is evidence that some of them went upon the land, they say it was this same tract of land and that they hunted and that Mr. Perry hunted after he conveyed it. These witnesses conflict. You have got positive testimony by numerous witnesses as to where the line was and you have a good deal of testimony as to possession on behalf of the plaintiff. The possession testimony amounts mainly to plaintiff's own testimony. He says he hunted on the place from time to time, over a course of years; he says that he cut some boards from fallen timber, and that he took off some posts. On the other hand the defendant company, through certain of its agents and employees, say that they posted the land, that

they plowed up and burned fire lines or fire-breaks and that they went over it from time to time to see that there was no poaching; and that even in recent years they have leased out the hunting rights. It is for you, and you solely, to determine whom you believe and what you believe.

I have taken away any question of exemplary damages because it is quite apparent in this case that both sides claim, in good faith, to be the owner of that property. You have here a man who has a deed, he says he has been paying taxes for twenty (20) odd years, and says he thought he owned it. On the other hand you have a company who bought the property and it comes down to it through a long chain of [fol. 66] title and it has been paying taxes on the property and actually goes and sells the timber on the property and says it acted in good faith; it was its timber and it still is its timber, what is there. Your verdict should decide whom this land belongs to and not only what damage was done, if any was done, and if Mr. Cone gets the property or the company retains the property.

There are small things here; in whose name the taxes were paid or how much land was returned for taxation—you can take those things for what they are worth. The fact you returned a tract of land doesn't mean you own it. The fact you paid taxes on it doesn't mean you are the owner and if two people happen to pay taxes on the same property that doesn't mean they both own it or that either owns it, the State will accept taxes from anybody that goes and makes a return, State and County, that is no proof of ownership. It may be some proof of ownership, you wouldn't waste your money paying taxes unless you thought or hoped you owned it, and the evidence in this case is they both paid taxes. There is some discrepancy as to whether the West Virginia Pulp & Paper Company paid it or the Cooper River Timber Company paid it but they said they paid the taxes.

Likewise a good deal has been said about the sale by the sheriff. When the sheriff advertised the property of A. N. Cone, he advertised the property he had put on the auditor's tax books, he didn't say it belonged to him, that doesn't say it belonged to A. N. Cone. When he advertises property of mine or yours he doesn't look at the title and decide whether you or I own it. You may consider if there is any evidence, any reason to believe

that the company was afraid of its title and went and [fol. 67] bought it in or you may conclude that the company, like a good many people do, when they see property advertised for taxes, they buy it in and get a title for it.

You were somewhat hampered in this case by reason of the fact we don't have any surveyors who followed the line or say how or where those plats were made. We have two plats, one made and introduced in behalf of the plaintiff and one introduced and made on behalf of the defendant. One shows the property as belonging to Mr. Cone and the other shows the property as belonging to West Virginia Pulp & Paper Company. You have heard considerable testimony as to the boundaries, the canal and as to common knowledge and hearsay in the community, you have heard a number of witnesses for the plaintiff, others for the defendant, some employees of the company, some former employees, some of them with no connection, two of them named Cone testifying these were not Cone lands; other Cones testified they were Cone lands. Now, gentlemen, these facts are for you to determine and you entirely.

In this case the plaintiff carries the burden of proof and must prove his case beyond no by the preponderance or the greater weight of the evidence. He brings this suit and it is encumbent upon him to prove it by the greater weight of the evidence. If he has satisfied you that he had title to this property or if he has satisfied you he was in lawful possession of this property then he is entitled to a verdict at your hands. If he has done that. And if he has failed to do that, if he has failed to carry the burden of proof or if the defendant has gone further than that and proven to your satisfaction that it owns the lands and it was in lawful possession of the land, then you must find for the defendant.

[fol. 68] If you find for the plaintiff you will find what was the actual damage suffered by him. The actual damage in this case would be the value of the timber that was cut and taken away. I charge you, gentlemen, that the cutting by the Carolina Logging Company, by Mr. Cooley's Company, as it was commonly referred to, if it was unlawful was for the benefit and at the instance of the West Virginia Pulp and Paper Company, so that if you find that the plaintiff did own the land, had possession

of it and is entitled to be reimbursed, you have a right to find a verdict against the defendant. You have to estimate, if you find for the plaintiff, how much it should be. You have heard the testimony, they put up two witnesses, one who testified about $25,000.00 and the other about $21,000.00. The testimony, as to valuation in this case, is rather unsatisfactory to my mind, from all standpoints, those witnesses went a month or six weeks ago and counted some rotten stumps. On the other hand the company brought a man who worked for Carolina Logging Company, who said he estimated it was about 600,000 feet of timber and gave the general estimate as to what he thought the value would be, around about a little over $6,000.00. You are dependent, however, upon such testimony as is produced here and the evidence given in this room. If you find that the plaintiff is entitled to a verdict then you may or you should find what is a value of the damages and that is what is the value of the timber taken, not exceeding, of course, the sum of $25,000.00, which is the amount sued for.

If you should not find the plaintiff is entitled to a verdict, if you find he has failed to sustain his case by the preponderance of the evidence, your verdict must be for the defendant.

[fol. 69] You will take with you the exhibits in this case and study them, read them in your room; you will take with you the amended complaint and the answer. On the back of one of these papers, labeled "amended complaint," you will find the clerk has written on there the words: "We the jury find for the....." If you find for the plaintiff you will add the word "plaintiff" and after the word "plaintiff" write out then, "so many dollars," the amount of the damages, and sign your name, Mr. Foreman, and date it today, May 22nd. If you find for the defendant, you will simply write the word "defendant" as the word and sign your name as foreman and date it.

The Court: Is there anything further?

Mr. Waring: I believe your Honor neglected to charge the 40 years statute.

The Court: Yes, I will charge it, if it applies.

Gentlemen of the jury, there is a statute in this State known as the 40 years statute, which says no action shall

be commenced in any case for the recovery of real property, or for any interest there, against the person in possession under claim of title by virtue of a written instrument, unless the person claiming his ancestor or grantor, was actually in possession of the same or a part thereof within 40 years from the commencement of such action. And the possession of a defendant, sole or connected pursuant to the provisions of this section, shall be deemed valid against the world after the lapse of said period.

That just means that if a man is in possession of the land he doesn't have to go back beyond 40 years, he can show 40 years possession and doesn't have to go beyond that.

The Court: Are there any exceptions to the charge? [fol. 70] Mr. Waring: The defendant would like to note an exception to that part of your charge in which you said that that cut by the Carolina Logging Company or corporation was for the benefit and at the instance of the West Virginia Pulp & Paper Company. I think that is the way you stated it.

The Court: Yes, that was about the way I stated it, and I repeat to you, gentlemen, that if you find the timber was cut by the Carolina Logging Company and it was cut by them, that it was cut at the instance of the West Virginia Pulp & Paper Company because the testimony is that its agent took them there and pointed out the place where they were to cut and sold it to them and you are warranted in finding a verdict against the West Virginia Pulp & Paper Company if you find the plaintiff is entitled to a verdict, of course.

PLAINTIFF'S EXHIBIT NO. P-A

Deed of Caroline F. Cone to A. N. Cone

STATE OF SOUTH CAROLINA,

Know All Men By These Presents, That I, Caroline F. Cone, of Dorchester County, in the State aforesaid, for and in consideration of the sum of Five Dollars and other valuable consideration to me in hand paid at and before the sealing of these presents by A. N. Cone, of Dorchester County, in the State aforesaid—farmer—the receipt whereof is hereby acknowledged, have granted, bargained,

[fol. 71] sold and released, and by these Presents do grant, bargain, sell and release unto the said A. N. Cone:

> All that certain lot, part, parcel or tract of land situated lying and being in Burns Township, Dorchester County, in the State aforesaid, containing one hundred six and one-half (106½) acres, more or less. Bounded as follows, viz: North by lands of J. Lamb Perry, East by lands said to be owned by Burton Lumber Company, formerly Sarah Cone, South by lands of F. Goodwine, formerly Sarah Cone, West by lands of M. C. Cone. All of above description more fully appears when reference is had to plat of property hereby conveyed, made by Jas. A. Postell, Surveyor, dated Aug. 16th A.D., 1920.

Together with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said premises before mentioned unto the said A. N. Cone, his Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said A. N. Cone, his Heirs and Assigns, against me and my Heirs, lawfully claiming, or to claim the same or any part thereof.

Witness my Hand and Seal this 16th day of August in the year of our Lord one thousand nine hundred and [fol. 72] twenty in the one hundred and 45th year of the Sovereignty and Independence of the United States of America.

/s/ Caroline F. Cone, L.S.

Signed, Sealed and Delivered in the presence of:

/s/ Lillie Cone, Luther Cone

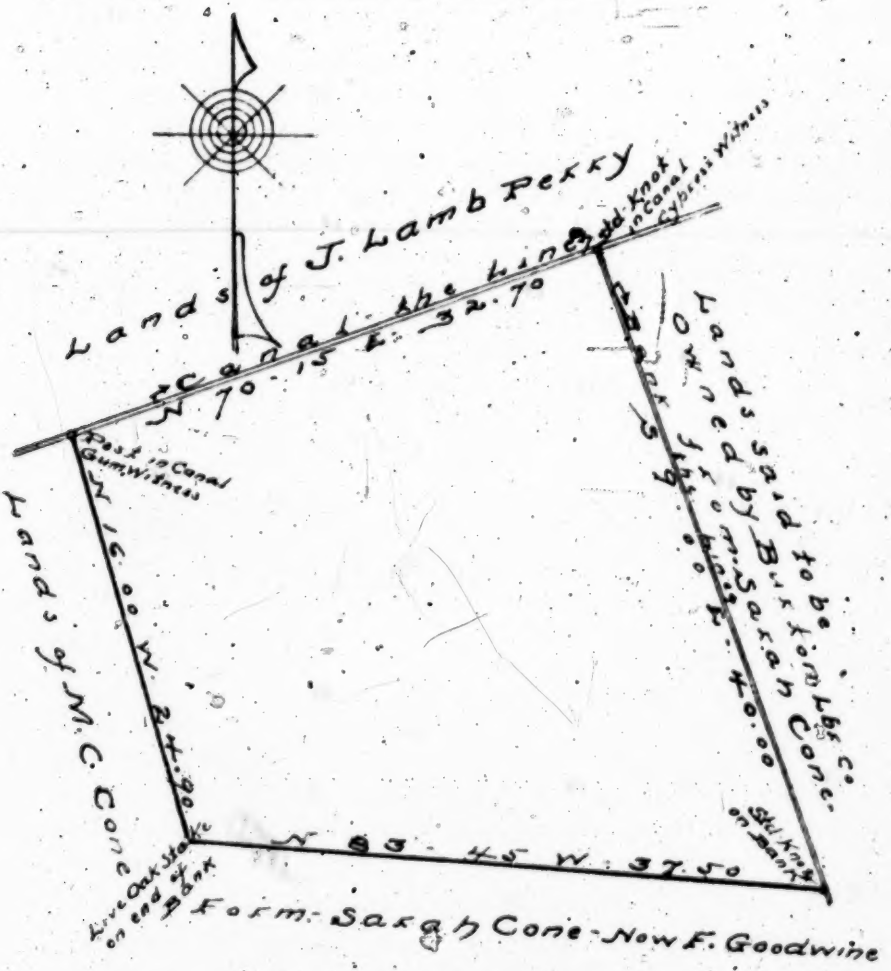
THE STATE OF SOUTH CAROLINA,
Dorchester County

Personally appeared before me Lillie Cone and made oath that she saw the within named Caroline F. Cone sign, seal, and as her act and deed, deliver the within written Deed; and that she with Luther Cone witnessed the execution thereof.

/s/ Lillie Cone.

Sworn to before me this 16th day of August, A.D. 1920. /s/ Jas. A. Postell (seal) Notary Public S. C. (seal)

[fol. 73] PLAINTIFF'S EXHIBIT P–B



Plat representing One Hundred and Six and one half (106½) Acres of Land Situated in Dorchester County - South Carolina Deeded by Mrs. Caroline F. Cone (his Mother) To A. N. Cone - August 16 - 1920.

Jos. A. Postell,
Surveyor.

Scale - 1 inch = 10 Chains

[fol. 74] PLAINTIFF'S EXHIBIT NO. P-D

CERTIFICATE OF AUDITOR OF DORCHESTER COUNTY, TRUE AND CORRECT COPY OF RECORDS, 5-14-45

STATE OF SOUTH CAROLINA
County of Dorchester

CERTIFICATE

St. George, S. C.
14 May, 1945.

I, the undersigned H. J. Patrick, duly elected and qualified Auditor for Dorchester County, South Carolina, hereby certify the following to be a true and correct copy of records under my supervision in the County Court House of Dorchester County:

1.	1944	Burns	School	District	No. 22	A. N. Cone	106½ acres	Pd.
	1943	"	"	"	"	"	"	"
	1942	"	"	"	"	"	"	"
	1941	"	"	"	"	"	"	"
	1940	"	"	"	"	"	"	"
	1939	"	"	"	"	"	"	"
	1938	"	"	"	"	"	"	"
	1937	"	"	"	"	"	"	"
	1936	"	"	"	"	"	"	"
	1935	"	"	"	"	"	"	"
	1934	"	"	"	"	"	"	"
	1933	"	"	"	"	"	"	"
	1932	"	"	"	"	"	"	"
	1931	Burns School District—Formerly No. 11 now No. 22						
						A. N. Cone	106½ acres	Pd.
	1930	Burns	School	District	No. 11	A. N. Cone	106½ acres	Pd.
	1929	"	"	"	"	"	"	"
	1928	"	"	"	"	"	"	"
	1927	"	"	"	"	"	"	"
	1926	"	"	"	"	"	"	"
	1925	"	"	"	"	"	"	"
	1924	"	"	"	"	"	"	"
	1923	"	"	"	"	"	"	"
	1922	"	"	"	"	"	"	"
	1921	"	"	"	"	"	"	"

[fols. 75-76]

2.	1915	Burns	School	District	No. 11	Miles Cone	385 acres	Pd.
	1916	"	"	"	"	"	"	"
	1917	"	"	"	"	"	320 acres	"
	1918	"	"	"	"	"	"	"
	1919	"	"	"	"	"	"	"
	1920	"	"	"	"	"	"	"
3.	1917	Burns	School	District	No. 11	Mrs. C. F. Cone	55 acres	Pd.
	1918	"	"	"	"	"	50 acres	"
	1919	"	"	"	"	"	"	"
	1920	"	"	"	"	"	"	"
	1921	Personal Property only						

Certified under seal in my office this 14th day of May, 1945.

/s/ H. J. Patrick (L.S.) H. J. Patrick, Auditor, Dorchester County.

(Here follows 1 Photolithograph, side folio 77)

[fol. 78] DEFENDANT'S EXHIBIT NO. D-2

DEED OF J. LAMB PERRY TO WEST VIRGINIA PULP AND PAPER COMPANY DATED APRIL 5, 1924

THE STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men by These Presents, that I, James Lamb Perry, of the City of Charleston in the County of Charleston and State aforesaid, for and in consideration of the sum of Ten ($10.00) Dollars and other good and valuable consideration to me in hand well and truly paid at and before the sealing and delivery of these Presents by West Virginia Pulp and Paper Company, a corporation duly organized under the laws of the State of Delaware, with principal place of business in the City of New York in the County and State of New York, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these Presents do grant, bargain, sell and release unto the said West Virginia Pulp and Paper Company:

All that certain piece, parcel or tract of land situate, lying and being in the County of Dorchester and State of South Carolina, known as the "Cadden" tract, measuring and containing according to a plat thereof and of adjoining lands made by J. P. Gaillard, C.E., dated August 1923, Two Hundred Fifty-three (253) Acres, and Butting and Bounding according to said plat as follows: to the North on the road to [fol. 79] Summerville; to the East and South on "Lamb's" Plantation and to the West on "Carnes" Plantation, on lands of Glenn and on lands of Peter Daniels and having such shape, form, marks, particular boundaries, courses and distances as are represented and delineated on said plat, which said plat is hereby declared to be, *pro tanto*, a part and parcel hereof. Being the same premises which were conveyed to me, the said James Lamb Perry in and by the following deeds of conveyance: by Carolina Insurance and Realty Company by deed bearing date the 11th day of November, A. D. 1922, to be recorded; by M. J. Cadden by deed bearing date the 2nd day of May, A. D. 1910, to be recorded; by Lula Georgie

I am area marked
not produce a plat of
Tantiate his Claim, and
practically a continuation
stained, I have accepted
line J.P.G. Aug 1923.

Limehouse

Tuttle R Edwards

PINE-LAN
460.0 Ac.

T. J. Wright

Waring

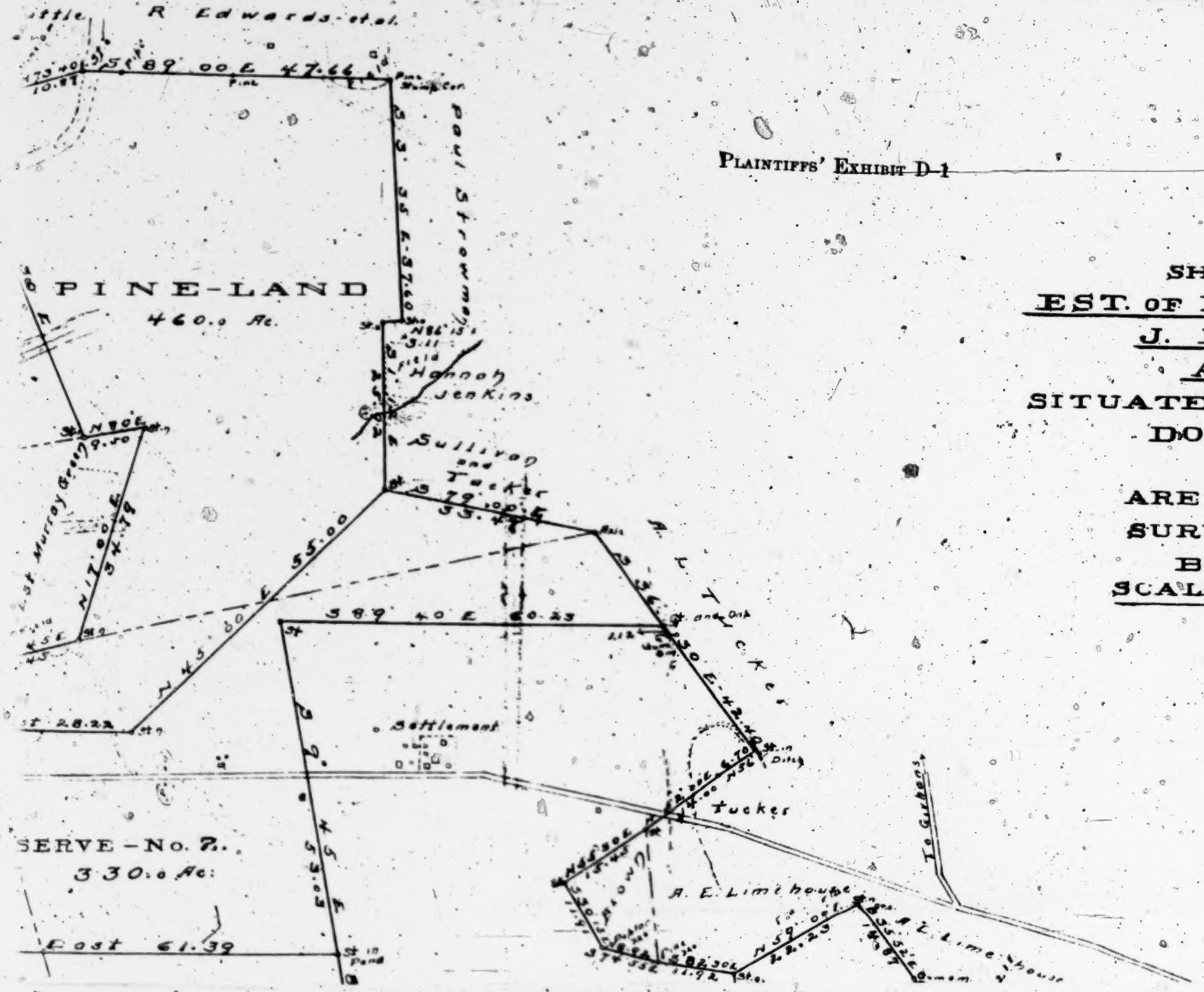
Part of
Lambs

RESERVE
No-4-7.0Ac.

RESERVE - No. 2.
330.0 Ac.

Lost 61.39

PLAINTIFFS' EXHIBIT D-1



MAP

SHOWING LAND OF

EST. OF MARTHA H. PERRY,

J. LAMB PERRY,

A. S. PERRY,

SITUATE IN ST. PAULS PARISH

DORCHESTER, CO.

S. C.

AREA-8194.0 ACRES.

SURVEYED-AUG. 1925.

BY J. P. Gaillard, C.E.

SCALE 1-INCH=20-CHAINS.

Dunlap, Harmon Cadden and Horace Cadden by deed bearing date the 19th day of October, A. D. 1908, to be recorded and by Louis Cadden, Ransome Cadden, Martha E. Drose and Eliza Hansom White by deed bearing date the 28th day of December, A. D. 1906, recorded in the office of the Clerk of Court for Dorchester County in Deed Book 9, page 553. ALSO

All that certain piece, parcel or tract of land situate, lying and being in the County of Dorchester and State of South Carolina, known as the "WARING" tract, measuring and containing according to the aforesaid plat made by J. P. Gaillard, C.E., dated August 1923, of said Waring tract and adjoining lands, Eight Hundred Sixty-eight (868) Acres, and Butting and Bounding according to said plat as follows: to the North on "Lamb's" Plantation; to the [fol. 80] East on "Harrietville" or "Scott's" Plantation, on lands of the Presbyterian Church and on lands of W. M. Cone; to the South on lands of R. M. Limehouse, on lands of the Presbyterian Church, on lands of W. M. Cone, on lands of S. E. Cone and on the "Ben Perry" tract, and to the West on lands of Miles Cone and on the "Ben Perry" tract, and having such shape, form, marks, particular boundaries, courses and distances as are represented and delineated on said plat, which said plat is hereby declared to be, *pro tanto,* a part and parcel hereof. Being the same premises which were conveyed to me, the said James Lamb Perry by Mary Josephine Waring by deed bearing date the 18th day of September, A. D. 1899, recorded in the office of the Clerk of Court for Dorchester County in Deed Book 2, page 213.

Together with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have an to Hold, all and singular, the said Premises before mentioned unto the said West Virginia Pulp and Paper Company, its successors and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said West Virginia Pulp and Paper Company, its successors

and Assigns, against myself and my heirs and all persons whomsoever lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal, this 5th day of April, [fol. 81] in the year of our Lord one thousand nine hundred and twenty-four in the one hundred and forty-eighth year of the Sovereignty and Independence of the United States of America.

/s/ J. Lamb Perry, (L.S.)

Signed, sealed and delivered in the presence of:
/s/ Blackburn Hughes, /s/ William D. Comings.

THE STATE OF SOUTH CAROLINA,
County of Charleston.

Personally appeared before me Blackburn Hughes and made oath that he saw the within names James Lamb Perry sign, seal, and as his Act and Deed, deliver the within written Deed; and that he with William D. Comings witnessed the execution thereof.

Sworn to before me, this 18th day of April, A.D. 1924.
/s/ Blackburn Hughes. /s/ Capers G. Barr (L.S.)
Notary Public for S. C.

Within deed although dated April 5th 1924 was not delivered until this 18th day of April 1924. /s/ J. Lamb Perry, (Seal) Recorded April 29th, 1924. Grantor A. Widower.

S. C. D. Stamps Cancelled $37.00
Revenue 37.00

[fol. 82] DEFENDANT'S EXHIBIT No. D-3

Deed of Mary Joseph Waring to J. Lamb Perry

The State of South Carolina.

Whereas I. Mary Joseph Waring of the Town of Summerville, Dorchester County, State aforesaid am the owner in fee of an undivided half right title and interest in and to a certain tract or Plantation known as Hope Plantation in the County of Dorchester formerly a part of Colleton County in the State aforesaid which said Plantation was by deed bearing date the 1st day of April 1859 conveyed to Mary S. War-

ing and Josephine M. Waring by Tupper Master under order of Court entitled Perry *et al Exors.* v. Perry *et al*—and whereas I as sole heir at law of Joseph Ioor Waring and Mary S. Waring deceased am justly entitled and in possession of the other one undivided half part of said Hope Plantation, (which said) Sixty-three acres more or less adjoining same and for over forty years forming part of said Hope Plantation which said sixty-three acres of Swamp land was conveyed to Joseph Ioor Waring by deed and plat annexed to deed bearing date 22nd December 1839 by E. B. Scott deceased.

And whereas I am now minded for valuable consideration to convey the said tracts, which for 40 years has formed one tract unto J. Lamb Perry.

Know all men by these presents, That I, Mary Joseph [fol. 83] Waring of the Town of Summerville, County and State aforesaid, in my own right and as the sole heir of Joseph Ioor and Mary S. Waring, who have long since departed this life in the State aforesaid in consideration of the sum of One thousand ($1,000) Dollars to me paid by J. Lamb Perry in the State aforesaid, (receipt whereof is hereby acknowledged) have granted, bargained, sold and released, and by these presents, do grant, bargain, sell and release unto the said J. Lamb Perry all those two tracts of land, which from 1859 to date has formed one tract containing 563 acres more or less known as Hope Plantation and Jos. Ioor Waring tract of 63 acres (purchased in 1839 by said Waring from E. B. Scott)—Described separately as follows: All that Plantation or tract of land situate, lying and being in the Parish of St. Paul's in the District of Colleton (now Dorchester County) and State aforesaid called the Hope Plantation Containing Five hundred Acres more or less Butting and Bounding to the North on lands of James T. Lamb (now Perry), East and South on lands of Estate of Jos. Ioor Waring and West on lands of the estate of Benj. Perry (now Perry), being the property conveyed to Mary S. Waring and Josephine M. Waring by Tupper Master, April, 1859.

Also all that tract of Swamp land Containing 63 acres more or less Butting and Bounding on the North and East by lands of Elias B. Scott (now Perry), West by lands of Jos. Ioor Waring and South by Public Road as

will more fully appear by a plat attached to Deed from E. B. Scott to Jos. Ioor Waring dated 22nd day of December, 1839, Recorded R.M.C. Office Colleton District in Book O at page 162 April, 1840—The property hereby in-
[fol. 84] tended to be conveyed includes all the Plantation property in what was once known as St. Paul's Parish of old Colleton County belonging to the Estate of Jos. Ioor Waring, Estate of Mary S. Waring and of Mary Joseph Waring.

Together with all and singular the Rights, Members, Hereditaments, and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

To have and to hold all and singular the said premises before mentioned, unto the said Jas. Lamb Perry his Heirs and Assigns forever. And I, Mary Joseph Waring do hereby bind myself my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Jas. Lamb Perry his Heirs and Assigns against me and my Heirs and all persons whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness my Hand and Seal this 18th day of September in the year of our Lord one thousand eight hundred and ninety-nine and in the One hundred and twenty-fourth year of the Sovereignty and Independence of the United States of America.

/s/ M. J. Waring (Seal). ($1.00 in Documentary Stamps)

Signed, Sealed and Delivered in the Presence of /s/ J. Allen Miles, /s/ L. J. Simons.

[fol. 85] The State of South Carolina,
County of Dorchester.

Personally appeared before me J. Allen Miles and made oath that he saw the within named M. J. Waring, Sign, Seal, and as her Act and Deed, deliver the within written Deed, and that with L. J. Simons witnessed the execution thereof.

/s/ J. Allen Miles.

Sworn to before me this 4th day of December, A. D. 1899. (Seal), /s/ Richard B. Smythe, Notary Public for S. C., Recorded this 5th day of December, 1899.

DEFENDANT'S EXHIBIT D-4

Deed from James Tupper, Master, to Mary S. Waring and Josephine M. Waring

The State of South Carolina

To all to whom these Presents shall come or be made known, Or whom the same may in anywise Concern, I, James Tupper, Master in Equity for the District of Charleston, the said State,

Send Greeting

Whereas, Sarah F. Perry Executrix and Archibald [fol. 86] S. J. Perry and Thomas R. Waring Executors of Benjamin Perry deceased on or about the eleventh day of November in the year one thousand eight hundred and fifty eight did exhibit their Bill of Complaint in the *Court of Equity* at Charleston in the District of Charleston and State aforesaid, against Jane Waring Perry, Martha Waring Perry, Richard Waring Perry, Thomas Waring Perry, Mary S. Waring and Josephine M. Waring for general relief, and the said Defendants having appeared, answered the said Bill and submitted their several rights and interests in the said premises to the Court, *and* the cause being at issue before the Honorable Court aforesaid, came on to be heard at its February sitting one thousand eight hundred and fifty nine when the said Court after full hearing thereof, and mature deliberation in the premises, did Order, Adjudge and Decree that the estate more particularly hereinafter set forth and described, should be conveyed by the Master of the said Court to Mary S. Waring and Josephine M. Waring in the proportion of one half to each, upon the said Mary S. Waring Executrix of Joseph Ioor Waring deceased paying to the said Master the balance due on the purchase of the Plantation hereinafter described, with interest thereon, all of which will more fully appear on reference to the Registry of the said Court where the order and decree final in the case made are on file.

Now, Know All Men, That I, the said James Tupper, Master of the said Court, in consideration of the premises, and also in consideration of the sum of *Fourteen hundred and sixty two Dollars and eighty nine cents*

paid me by the said Mary S. Waring and Josephine M. [fol. 87] Waring, the receipt whereof is hereby acknowledged, *have* granted, bargained, sold and released, and by these presents *Do* grant, bargain, sell and release unto the said Mary. S. Waring and Josephine M. Waring and their Heirs and Assigns, *All that Plantation or Tract of Land*, situate, lying and being in the Parish of St. Pauls in the District of Colleton and State aforesaid, called the Hope Plantation, containing Five hundred (500) Acres more or less, Butting and Bounding to the North on lands of James T. Lamb, East and South on lands of the Estate of Joseph Ioor Waring and West on lands of the Estate of Benjamin Perry, *Together* with all and singular the hereditaments, rights, members and appurtenances whatsoever, to the said Lands belonging or in anywise appertaining and the reversions and remainders, rents, issues, and profits thereof: *And* also the estate, right, title, interest, dower, possession, property benefit, claim and demand, whatsoever, both at law and in Equity of the said Benjamin Perry deceased and of all the parties to the said suit, and of all other persons rightfully claiming, or to claim the same, or any part thereof, by, from or under them or either of them.

To Have and to Hold the said Plantation or Tract of Land with its hereditaments, privileges, and appurtenances, unto the said Mary S. Waring and Josephine M. Waring their Heirs and Assigns to them and their only proper benefit and behoof forever.

In Witness Whereof, I, the said James Tupper, Master of the said Court, under and by virtue of the said Decree, have hereunto set my Hand and Seal, at Charleston, this first day of April in the year of our Lord One [fol. 88] thousand eight hundred and fifty nine and in the Eighty third year of the Sovereignty and Independence of the United States of America.

/s/ James Tupper, Master in Equity. (Official Seal)

Sealed and Delivered in Presence of /s/ James S. Simons, William Tupper.

SOUTH CAROLINA,
Charleston District.

Personally appeared James S. Simons and made oath that he saw James Tupper Esquire, Master in Equity, sign, seal and as his act, deliver the within deed; and that deponent together with William Tupper signed their names as witnesses thereto.

/s/ James S. Simons.

Sworn to before me this 21st Sept. 1859. /s/ F. I. Winkler, Not Pub & Ex Off Mag: Recorded April 29th, 1924.

[fol. 89] DEFENDANT'S EXHIBIT No. D-5

Deed from Elias B. Scott to Joseph Ioor Waring

THE STATE OF SOUTH CAROLINA.

Know All Men by These Presents, THAT I, Elias B. Scott, of St. Pauls Parish in the State aforesaid, in consideration of the sum of One Hundred & Twenty Six Dollars to me paid by Joseph Ioor Waring of St. Pauls Parish Colleton District in the State aforesaid, have granted, bargained, sold, and released, and by these presents, Do grant, bargain, sell, and release, unto the said Joseph Ioor Waring that tract of swamp land containing sixty three acres more or less, butting and bounding on the North and East by lands of Elias B. Scott, West by lands of Joseph I. Waring & South by public road as will more fully appear by a plat attached to this. TOGETHER with all and singular the Rights, Members, Hereditaments, and Appurtenances, to the said Premises belonging, or in any wise incident or appertaining:

To Have and to Hold all and singular the Premises before mentioned, unto the said Joseph Ioor Waring his Heirs and Assigns, forever. And I do hereby bind myself & my Heirs, Executors, and Administrators, to warrant and forever defend all and singular the said Premises, unto the said Joseph Ioor Waring his Heirs and Assigns, against me and my Heirs, lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal this twenty second day of December in the year of our Lord one thousand eight

[fol. 90] hundred and Thirty nine and in the Sixty-fourth year of the Independence of the United States of America.

/s/ Elias B. Scott.

Signed, Sealed, and Delivered in the Presence of /s/ Mary Anna McPherson, /s/ Lewis Hutson (Seal).

THE STATE OF SOUTH CAROLINA.
Colleton District.

Personally appeared before me Mrs. Mary Anna McPherson and made oath, that she saw the within named Elias B. Scott sign, seal, and as his act and deed, deliver the within written deed; and that she with Lewis Hutson witnessed the execution thereof.

/s/ Mary Anna McPherson.

Sworn before me 22nd this day of December, 1839.
/s/ Thos. B. Miles (Q N)

THE STATE OF SOUTH CAROLINA,
Colleton District.

RENUNCIATION OF DOWER

I Thomas B. Miles one of the Justices of the Quorum do hereby certify unto all whom it may concern, that Mrs. Caroline E. Scott the wife of the within named Elias B. Scott did this day appear before me, and upon [fol. 91] being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread, or fear of any person, or persons whomsoever, renounce, release, and forever relinquish unto the within named Joseph Ioor Waring, his Heirs and Assigns, all her interest and estate, and also all her right and claim of dower, of, in, or to, all and singular the premises within mentioned and released.

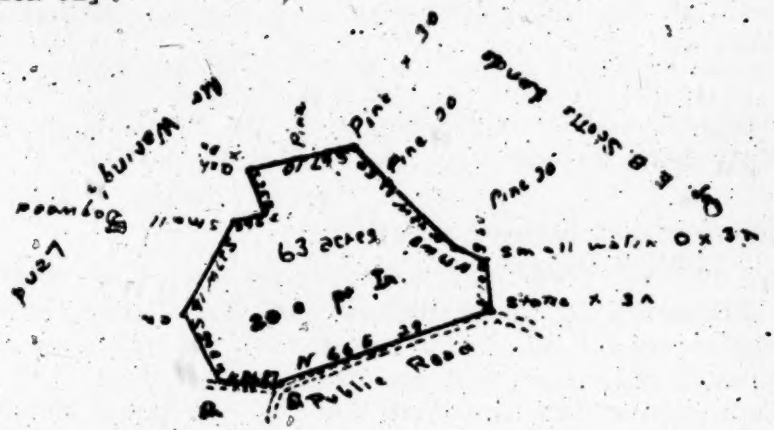
Given under my Hand and Seal, this 22nd day of December *Anno Domini*, 1839.

/s/ Thos. B. Miles (Q N)

/s/ Caroline E. Scott

Recorded March 29th, 1924.

[fol. 92]



South Carolina.

Pursuant to request of Cap. E. B. Scott I have resurveyed and admeasured a small tract of Land containing Sixty three acres Situated in Colleton District St. Paul's Parish and hath such Buttings and Boundings shape and marks as the above Plat represents Surveyed the 10th day of May 1839.

By /s/ F. I. Mellard, D.S.

[fol. 93] Defendant's Exhibit No. D-6

Deed from Mary S. Waring and Mary Joseph Waring to John Cone

The State of South Carolina.

Know all men by these presents that we Mary S. Waring & Mary Joseph Waring heirs at law of Joseph I. Waring of Colleton County deceased who died seized in fee of the premises hereinafter mentioned in the State aforesaid in consideration of the sum of one hundred and forty three dollars to us in hand paid at and before the sealing of these presents by John Cone of Colleton County in the State aforesaid Farmer (the receipt whereof is hereby acknowledged) have granted bargained sold and released and by these presents do grant bargain sell and release unto the said John Cone.

All that tract of land situate lying and being in St. Pauls Parish Colleton County and State aforesaid measuring and containing one hundred and forty three acres more or less. Butting & Bounding to the No. th on lands of

the Estate of the said Joseph I. Waring East on lands of Estate of James Perry South and South East on lands of the Estate of James Perry and West on lands of Miles Cone and having such shape marks and lines as are delineated on a plat of said tract made by Louis A. Strobel Esquire Deputy Surveyor dated the seventh day of April A. D. 1880.

Together with all and singular the rights members hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

[fol. 94] To have and to hold all and singular the said premises before mentioned unto the said John Cone his heirs and assigns forever. And we do hereby bind ourselves & our heirs executors and administrators to warrant and forever defend all and singular the said premises unto the said John Cone his heirs and assigns against us and our heirs and all other persons lawfully claiming or to claim the same or any part thereof.

Witness our hands and seals this thirteenth day of April in the year of our Lord one thousand eight hundred and eighty and in the 104 year of the Sovereignty and Independence of the United States of America.

Mary S. Waring (L.S.)
Mary J. Waring (L.S.)

Signed, sealed and delivered in the presence of M. E. Johnson, M. E. Hutchinson.

STATE OF SOUTH CAROLINA,
Colleton County.

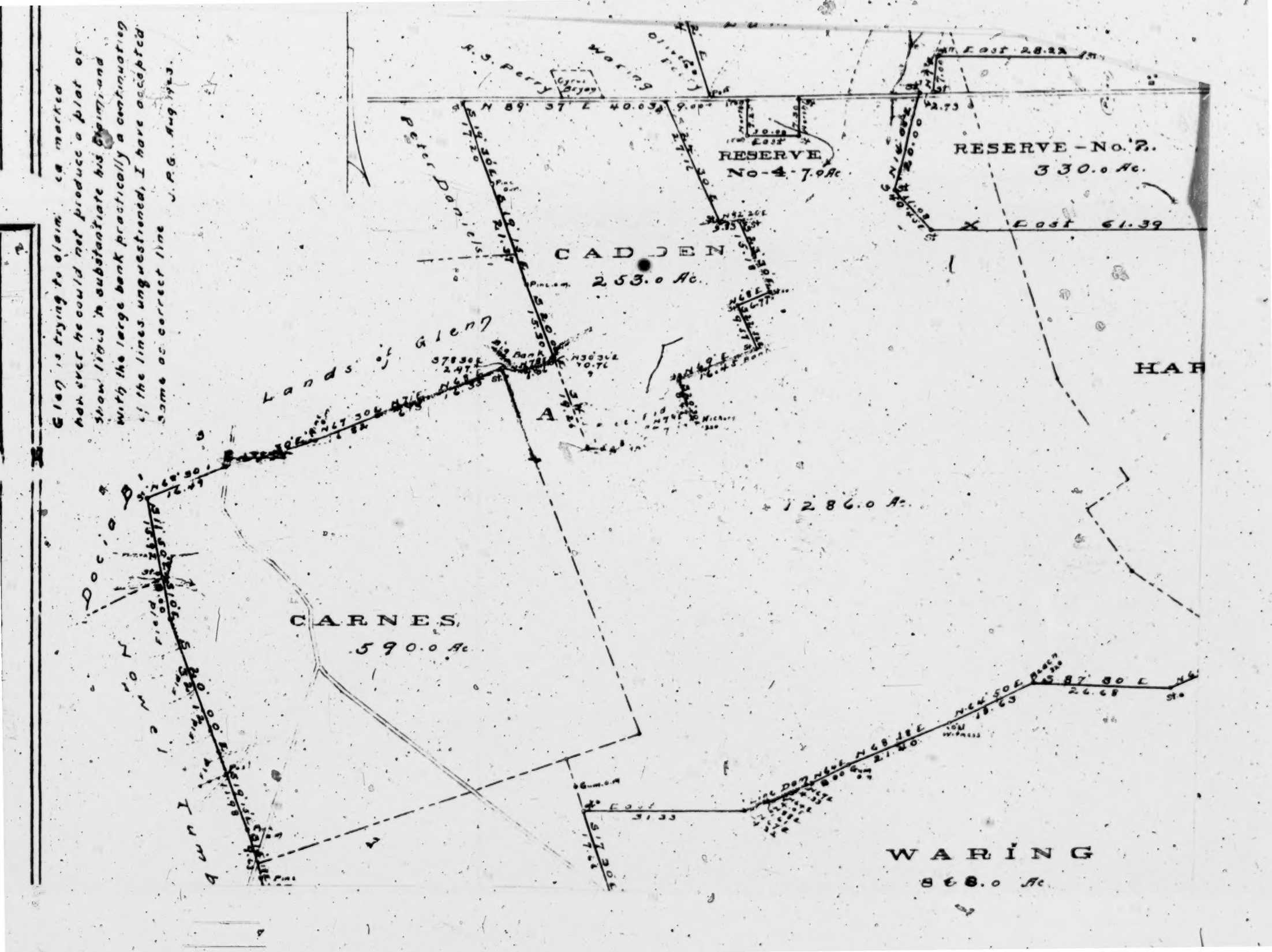
Personally appeared before me M. E. Hutchinson and made oath that he saw the within named Mary S. Waring [fol. 95] and Mary Joseph Waring sign seal and as their act & deed deliver the within written deed; and that he with Mary Edith Johnson witnessed the execution thereof.

M. E. Hutchinson

Sworn to before me this thirteenth day of April 1880 Josiah J. Perry (L.S.) Trial Justice Recorded March 4, 1884.

I hereby certify the foregoing to be a true copy as is recorded in Book No. 2 page No. 63.

H. D. Padgett, Clerk of Court


Glen is trying to claim as marked
but ever he could not produce a plat or
show title to substantiate his claim and
with the large bank practically a contractor
if the lines unquestioned, I have accepted
same as correct line
J. P. G. Aug 1923
A. S. Perry
Waring
Peter Donnelly
RESERVE
No-4-7.0Ac.
RESERVE-No. 2.
330.0 Ac.
CADDEN
253.0 Ac.
Lands of Glen
1286.0 Ac.
CARNES.
590.0 Ac.
WARING
868.0 Ac.
HAR

SERVE – No. 2.
330.0 Ac.

Lost 61.39

Settlement

Tucker

To Gutheys

A. E. Limehouse

A. L. Limehouse

M. M. Limehouse

A. S. PERRY
608.0 Ac.
RESERVE - No. 1
608.0 Ac)

HARRIETVILLE - OR SCOTTS.
1392.0 Acres

RESERVE
No. 3.
118.0 Ac

M. Perry

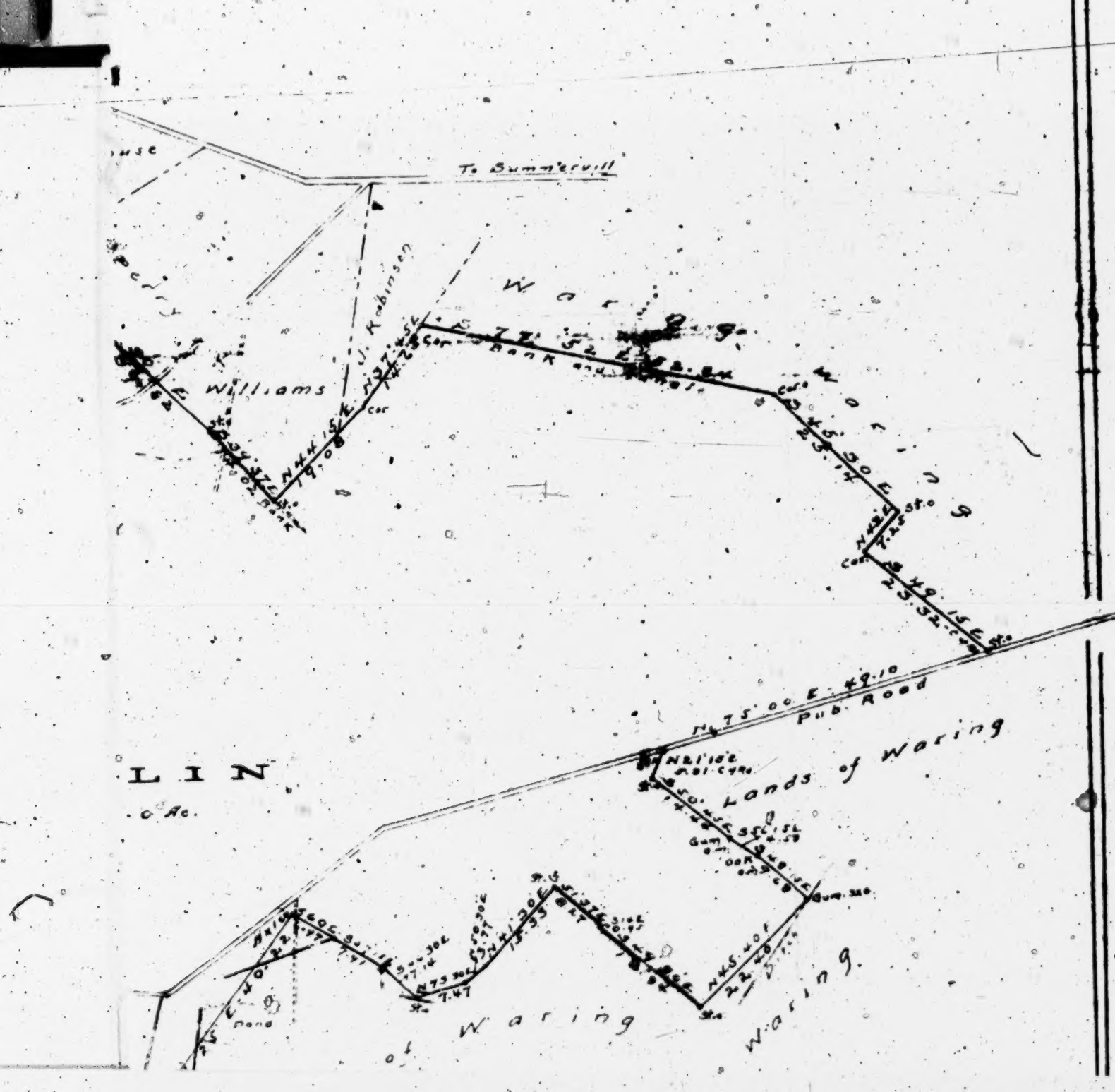
E. Williams

J. Robinson

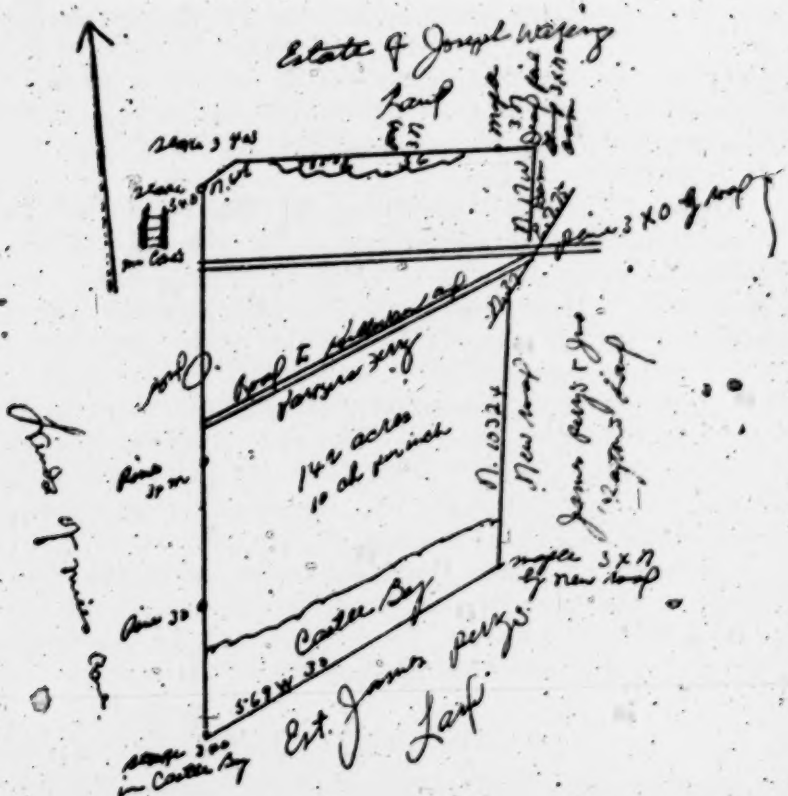
Kiddell Road

ROSLIN
2005.0 Ac.

ING


To Summerville
J. Robinson
Waring
E. Williams
Cor
Cor
Cor

[fol. 96]



SOUTH CAROLINA.

The above plan represents one hundred and fifty-three acres of land situated in St. Pauls Parish Colleton County being a portion of a tract of land belonging to the Estate of Joseph I. Waring, dec'd. and Surveyed for John Coné Esq. and it has such marks and boundaries as are above shown, Surveyed April 7, A. D. 1883, Louis A. Strobel, D. S. Recorded March 4, 1884.

I hereby certify the above to be a true copy of plat as recorded in Book No. 2 page 65.

H. D. Padgett, Clerk of Court

[fol. 97] DEFENDANT'S EXHIBIT NO. D-13

Deed of Adam Miles Cone to Miles Cone, Dated September 19, 1888, With Plat

A. MILES CONE TO MILES CONE

THE STATE OF SOUTH CAROLINA.

Know all men by these presents, that I, Adam Miles Cone of St. Paul's Parish Colleton County, in the State aforesaid, Farmer, in consideration of the sum of Three Hundred Dollars to me paid by Miles Cone in the State aforesaid, Farmer have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Miles Cone All of that piece or parcel of land situated in St. Pauls Parish County and State aforesaid, containing Two Hundred and Forty-eight acres, more or less, and bounded on the North by A. S. J. Perry, South by Est of Jennings Perry, on the West by Franklin Cone & on the East by John Cone formerly known as the Josiah Perry Estate tract Also all of that piece of land lying and being in St. Pauls Parish Colleton County, containing Seventy two acres, more or less, bounded on North by A. S. J. Perry South by lands of A. Miles Cone, East by above mentioned Tract of 248 acres and on West by Franklin Cone formerly belonging to H. Willis, but conveyed to A. M. Cone. "Together with all and singular the Rights, [fol. 98] Members, Hereditaments and Appurtenances to the said Premises belonging or in anywise incident or appertaining."

To Have and To Hold all and singular the said premises before mentioned unto the said Miles Cone his heirs and Assigns forever. And I do hereby bind myself and my heirs executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Miles Cone his heirs and assigns against me and my heirs lawfully claiming, or to claim the same or any part thereof.

Witness my hand and seal this Nineteenth day of September in the year of our Lord one thousand Eight hundred and Eighty Eight and in the one hundred and twelfth year of the Sovereignty and Independence of the United States of America.

A. M. Cone (L.S.)

Signed, Sealed and delivered in the presence of H. H. Pooser, L. G. Owens.

[fol. 99] THE STATE OF SOUTH CAROLINA,
Colleton County.

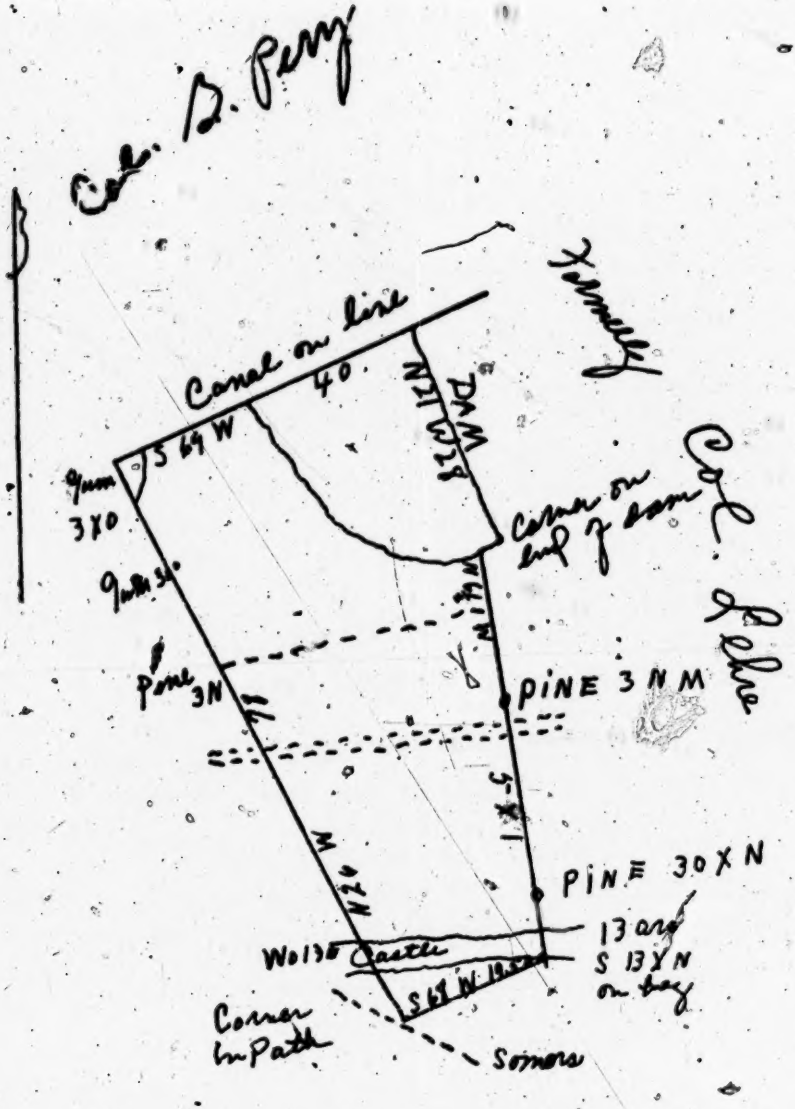
Personally appeared before me W. H. Pooser and made oath that he saw the within named Adam Miles Cone sign seal, and as his act and deed deliver the within written Deed and that he with L. G. Owens witnessed the execution thereof.

W. H. Pooser.

Sworn to before me this 19 day of Sept. A. D. 1888.
Louis A. Strobel, Notary Public. Recorded Oct. 6, 1888.
I certify the foregoing to be a true copy is Recorded in Book No. 7 Page 282.

H. D. Padgett, Clerk of Court.

[fol. 100]



248 Acres
Scale 20 chs per inch

Plat of two hundred and forty eight acres of land in St. Pauls Colleton District near Beach Hill belonging to the Est. of Josiah Perry—Surveyed and platted Jan. 15 1847 By T. P. Cooper, D. S.
Recorded Oct. 6, 1888.

[fol. 101] DEFENDANT'S EXHIBIT D-14.

Record of James Tupper, Master in Equity, Dated March 2, 1859

SARAH F. PERRY, EXECUTRIX & ARCHIBALD S. I. PERRY & THOMAS R. WARING, EXECUTORS OF BENJAMIN PERRY, DECEASED

vs.

JANE WARING PERRY, MARTHA WARING PERRY, et al.

Under the order of reference to report upon the facts in this case I have been attended by the Solicitors of the parties and by consent report.

Benjamin Perry, who died in April 1857 sold some time about the year 1828, to Joseph I. Waring a plantation in St. Pauls Parish containing 800 acres for $1400, but executed no conveyance. This plantation has been in possession of Mr. Waring and his heirs for over 30 years, since the death of Mr. Waring and before the death of Mr. Perry the latter presented a claim against the Estate of the former for a balance due upon the purchase of the said plantation. Upon a search the following statement dated the 1st May 1834, was found among the papers of Mr. Waring.

Amount by agreement for Hope Plantation on 1st Dec. 1828	1400.00
Then deducted amt of Col Perrys note with interest and open a/c	893.50
Balance	$ 506.50
[fol. 102] Interest on 506.50 for 5 yrs 5 mos	194.88
	701.38
Then deduct for rice 66 bushels @ 80c	52.80
Bal due Col P this day, Say 1 May '34	649.58

The Admx of Mr. Waring, altho satisfied that from long adverse and continuous possession of over 30 years that the title of her Intestate was complete at Law, has agreed to pay the amount shewn to be due by the above memorandum with interest deducting $70. due to her by

Col Perry in his lifetime upon the execution of good and sufficient titles for the Plantation at the charge of Col Perrys Estate.

The object of the Bill is to perfect said title by conveying the interest of the minor children of Col Perry, who are parties to these proceedings.

It is clear that the Statutory title in Mr. Waring was complete long before the death of Col Perry, and that the offer of Mrs. Waring to pay the balance due on the purchase arises from a high sense of justice and right.

I do not hesitate to recommend that upon Mrs. Waring the administratrix of Joseph L. Waring paying into Court the balance herein ascertained to be due upon the purchase of Hope Plantation that titles therefor be executed under the order of this Court, and that after providing for the costs and expenses of these proceedings, that the surplus be paid to the Executrix & Executors of Col Perry upon their executing Bond with approved sureties in double the said surplus for the due administra-
[fol. 103] tion of said fund as provided in the previous decrees of this Court in relation to the sale of the Real Estate of Col Perry.

Respectfully submitted, James Tupper Master in Equity
2 March 1859.

Filed 8th March 1859.

DEFENDANT'S EXHIBIT No. D-15

Certified Copy of Decree of F. H. Wordlaw, Taken From Decree Book February 16, 1858 to September 24, 1861

SARAH F. PERRY, EXECUTRIX, ARCHIBALD S. I. PERRY, THOMAS R. WARING, EXECUTORS OF BENJAMIN PERRY, Deceased

vs.

JANE WARING PERRY, et al.

On hearing read the report of Master Tupper it is ordered on motion of Messrs. Macbeth & Buist, Complainant's Solicitors, that the same be confirmed.

It is also ordered that the Defendant Martha S. Waring, Administratrix of Joseph Ioor Waring, deceased, pay to the said Master the balance due on the purchase

of the Hope Plantation with interest thereon and that the said Master do execute a title to the said plantation to the Defendants Martha S. Waring and Josephine M. Waring in the proportion of one third to the former and two thirds to the latter.

[fol. 104] It is further ordered that the said Master, after deducting from the amount to be paid to him the costs of these proceedings and a counsel fee of one hundred dollars to the Solicitors of the Defendants, Martha S. and Josephine M. Waring, do pay over to the Complainants the balance upon the execution by them of a Bond in double the amount to be paid, conditioned for its due administration.

F. H. Wardlaw.

March 8th, 1859.

We consent, Lockwood & Ramsey

In this case it is further ordered that the above order be so far amended, that the Master do execute titles to Mrs. Waring and her daughter in the proportion of one half to each.

F. H. Wardlaw.

9 March 1859

JUDGMENT

This Action having been brought to trial at a District Court held on the 22nd day of May, A. D. 1945, and a verdict for the Plaintiff having been rendered therein by the jury for the sum of Fifteen thousand and no/100 ($15,000.00) Dollars, and the costs having been adjudged at Eighty-seven and 70/100 ($87.70) Dollars;

Now, on motion of Messrs. Jefferies, McLeod & Unger, Attorneys for said Plaintiff

It is Adjudged that Plaintiff recover of said West Virginia Pulp & Paper Company, a corporation, Fifteen thousand and no/100 ($15,000.00) Dollars, so [fol. 105] found, with interest from May 22, 1945, at 6%, and Eighty-seven and 70/100 ($87.70) Dollars, costs.

Messrs. Jefferies, McLeod & Unger, Plaintiff's Attorneys.

Ernest L. Allen, C., D. C. U. S., E. Dist. S. C. June 5, 1945.

NOTICE OF MOTION FOR NEW TRIAL

TO MESSRS. JEFFERIES, MCLEOD & UNGER,
ATTORNEYS FOR THE PLAINTIFF:

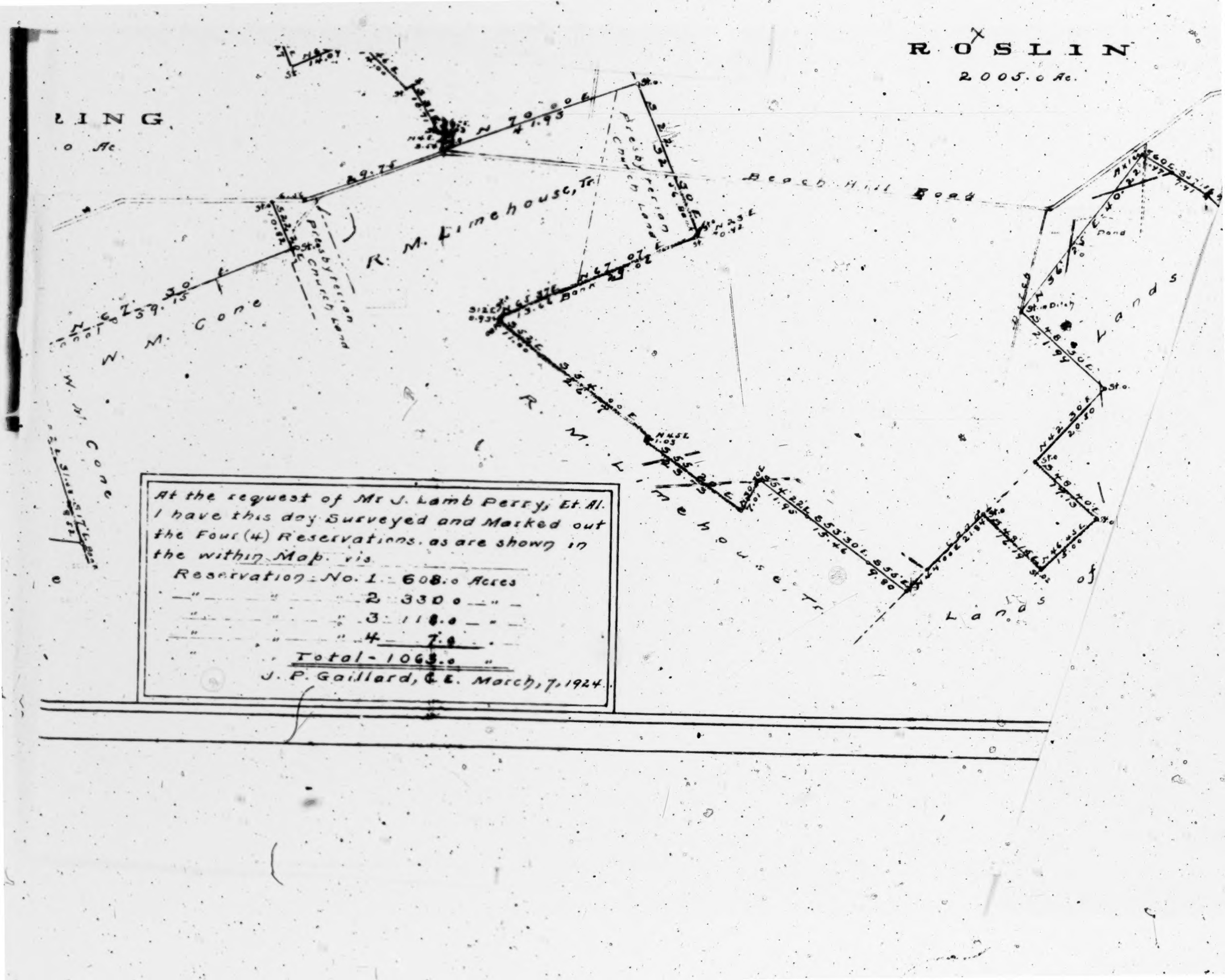
You Will Please Take Notice that the defendant above named, by its undersigned attorneys, will move before the Honorable J. Waties Waring, United States District Judge for the Eastern District of South Carolina, in the United States Courtroom in Charleston, South Carolina, on the 6th day of August, 1945, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard for an order granting a new trial in the above entitled cause, upon the ground that new evidence has been discovered which, despite reasonable diligence on behalf of the Plaintiff, was not discovered prior to the trial, in that:

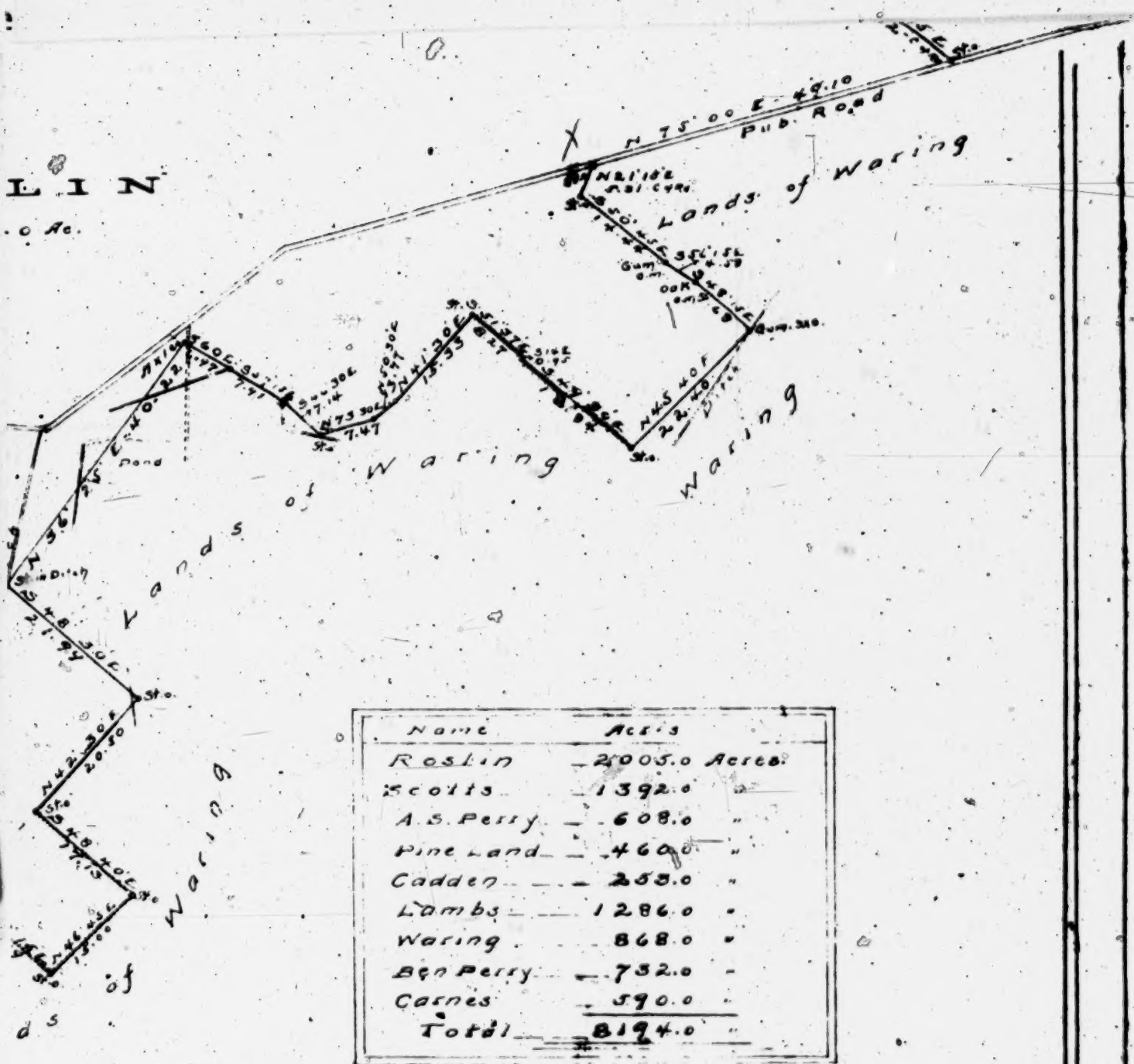
1. As will appear from the affidavit and exhibits hereto attached and from the record in the cause, there has been discovered since the trial, upon the public records of Dorchester County, documentary evidence showing that Miles Cone did not convey any part of his 320 acre tract [fol. 106] in Burns Township to his wife, Caroline F. Cone, which evidence disproves the unsubstantiated oral testimony of the plaintiff's witnesses that Miles Cone did convey the property which is the subject of the action to his wife, Caroline F. Cone, without which testimony the Plaintiff failed to establish his ownership of the property and recovery cannot be had.

2. As will appear from the affidavit and exhibits hereto attached and from the record in the cause, there has been discovered since the trial, upon the public records of Dorchester County, documentary evidence that Caroline F. Cone was the owner of lands in Burns Township other than the lands which are the subject of this action, which documentary evidence disproves and contradicts the testimony offered on behalf of the Plaintiff at the trial to the effect that the said Caroline F. Cone owned no other property in Burns Township at the time she allegedly conveyed the property in dispute to the Plaintiff, which testimony was offered by the Plaintiff to show acquisition of title to the disputed land and without which showing he could not have recovered in this action.

D. A. Brockington, Charles W. Waring, W[illegible]g & Brockington, Attorneys for the Defen[illegible]t, 35 Broad Street, Charleston, S. C.

Filed April 22nd 1924
and Recorded in Plat Book #3, Page 145-
And- Agreeably
Clerk of Court
Brunswick Co. N.C.


ROSLIN
2005.0 Ac.
LING
0 Ac
R. M. Limehouse, Tr.
Beach Hill Road
Presbyterian Church Land
Pond
Lands of
W. M. Cone
At the request of Mr J. Lamb Perry, Et. Al. I have this day Surveyed and Marked out the Four (4) Reservations as are shown in the within Map. viz
Reservation No. 1 608.0 Acres
" " 2 330.0 "
" " 3 118.0 "
" " 4 7.0 "
Total - 1063.0 "
J. P. Gaillard, C.E. March, 7, 1924.



Name	Acres
Roslin	2005.0 Acres.
Scotts	1392.0 "
A.S. Perry	608.0 "
Pine Land	460.0 "
Cadden	258.0 "
Lambs	1286.0 "
Waring	868.0 "
Ben Perry	732.0 "
Carnes	590.0 "
Total	8194.0 "

Note:
The interior lines of the above tracts were not Surveyed by me (Except the Cadden and Waring Tracts) but were Compiled from Old Maps - the above individual Areas was Calculated from the Compilation. J.P.G. Aug. 1923.

[fol. 107] AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Charleston.

Personally appeared before me Charles W. Waring, who being duly sworn, deposes and says as follows:

I am one of the Attorneys for the Defendant in the above entitled cause and prior to the trial thereof made an examination of the public records of Dorchester, Colleton and Charleston Counties of the State of South Carolina in an attempt to establish the correct recorded chain of title to the property involved herein.

It appears from the public records that this property is now located in Burns Township, Dorchester County, but prior to 1897 it was located in Colleton County and appears to have been a part of Colleton County or Colleton District continuously from the time of its formation (before the American Revolution) until 1897. It is an historical fact of common knowledge and is of evidence in this case, that the public records of Colleton County were destroyed in 1865 and for this reason it is impossible, in many instances, to fully abstract the titles to real estate which had its location in Colleton County as constituted prior to 1865. Hence, there must often exist an hiatus between the original grant from the Crown or the State and a conveyance of the land subsequent to 1865.

The Complaint states that the tract described therein is as shown by a Deed of Caroline F. Cone to A. N. Cone, dated 16th August, 1920, and recorded in the office of the Clerk of Court for Dorchester County, the 18th September, 1920, in Book 35 at Page 288. The Deed [fol. 108] so referred to was found recorded as indicated and it is through this Deed that A. N. Cone has based his ownership of the property. However, there is no public record of Dorchester or Colleton County which shows that Caroline F. Cone got title to this property and there is no way of discovering from any public record that, prior to her conveyance to Andrew N. Cone, there was any antecedent source of title.

A. N. Cone and his brother, Owen Cone, testified that Caroline F. Cone was their mother and that she died in 1924 and that their father, Miles C. Cone, died in 1941.

They also testified (over the Defendant's objection) that their father conveyed the property in question to their mother by a Deed of Conveyance in 1917, which Deed they said was not recorded and has been lost or destroyed. They further testified that this 106.5 acres in question was a part of a tract conveyed to Miles C. Cone by Adam Miles Cone, his father, by a Deed dated 19th September 1888 and recorded 6th October 1888 in the Office of the Clerk of Court for Colleton County in Book 7, Page 282, and in the Office of the Clerk of Court for Dorchester County in Colleton Transfer Deed Book 6, Page 138. This Deed to Miles C. Cone with the plat thereto annexed (Defendant's Exhibit D-13) is to be found in the respective offices referred to and describes two tracts of land containing, respectively, 248 acres and 72 acres or a total area of 320 acres. There is no indication on the records of Colleton or Dorchester Counties that any part of this property was ever transferred in any manner whatsoever from Miles C. Cone to Caroline F. Cone and there was no reason to believe from these records or from the pleadings that the property at issue [fol. 109] in this case came from the larger tract described in the Deed from Adam Miles Cone to Miles C. Cone. Furthermore, there was no word mentioned at the pre-trial conference, when matters pertaining to the trial appeared to be open to a full and frank discussion between the attorneys and the Court, which would have suggested Miles Cone as being a prior owner and the one from whom Caroline F. Cone acquired title.

In view of the fact that the boundings of the 320 acres conveyed by Adam Miles Cone to Miles C. Cone did not appear to include the property in question and in view of the fact that there was no deed of conveyance or any suggestion from any source of Caroline F. Cone having acquired any portion of this property, Deponent did not deem it necessary in preparing for trial to make a further examination of the public records in order to discover how Miles C. Cone disposed of his ownership in the 320 acres. The search of this Deponent was concentrated on attempting to find some transfer (whether by conveyance or inheritance) into Caroline F. Cone, and this could not be found on the records.

Since the date of trial of the above entitled cause,

Deponent has made a further examination of the records of Dorchester County, by reason of the surprising development at the trial that the Plaintiff's entire case was based on the claim that Miles C. Cone conveyed to his wife Caroline F. Cone 106.5 of the 320 acres acquired by the deed of Adam Miles Cone in 1888. As a result of this examination, Deponent has found upon the public records of Dorchester County two documentary evidences that Miles C. Cone did not convey to his wife, Caroline F. Cone, [fol. 110] any portion of this 320 acres. Attached hereto and designated Exhibit "A" is a certified copy of a Mortgage from Miles Cone to J. H. Cone dated the 17th f July, 1928, and recorded in the Office of the Clerk of Court for Dorchester County in Book of Mortgages 34, Page 126. This Mortgage gives a description of the mortgaged property identical to the description set forth in the Deed from Adam Miles Cone to Miles C. Cone with a sentence at the end of the description reading as follows: "The same being recorded Walterboro, S. C. in Book 7, page 282, conveyed to me by A. Miles Cone." The other instrument showing evidence of ownership is a Deed of Conveyance from Miles Cone to Owen C. Cone (the witness who testified that Miles Cone conveyed 106.5 acres to Caroline F. Cone out of this same 320 acre tract), dated the 11th of January 1932 and recorded in the office of the Clerk of Court for Dorchester County in Book of Conveyances 53, Page 227. In this Deed, the description varies somewhat from the earlier records, but clearly indicates that it is the same 320 acres and, so as to avoid all doubt, completes the description by adding a sentence reading as follows: "Being the same lands conveyed to Miles Cone by A. M. Cone by Deed dated September 18, 1888, recorded October 6, 1888, in the R. M. C. Office for Colleton County, S. C., in Book 7, at Page 282, but now being in Dorchester County, S. C., the said lands having been described in the said Deed as two tracts, one of 248 acres and the other of 72 acres, both tracts adjoining and forming one body, containing 320 acres, more or less.". A certified copy of this Deed is hereto attached and marked Exhibit "B." It is especially noteworthy that both of these instruments [fol. 111] contain the warranties of Miles Cone to the effect that he has good title to these 320 acres so de-

scribed, many years after the mythical and unrecorded deed of conveyance for 106.5 acres therefrom to his wife, Caroline F. Cone.

During the course of the trial, both A. N. Cone and his brother, Owen Cone, testified that their mother, Caroline F. Cone, owned no property whatsoever in Burns Township other than the property in dispute in this action and a certificate of the Auditor of Dorchester County was introduced to show that she returned and paid taxes in Burns Township or District on 55 acres in 1917 and on 50 acres in 1918, 1919 and 1920. On cross examination, it was denied by A. N. Cone that he had knowledge of any property acquired by his mother from a person by the name of Tumblestone, or from anyone by the name of Viard. Since the trial, an examination of the records of Dorchester County has disclosed that by Deed dated the 2nd day of December, 1916, recorded in the Office of the Clerk of Court for Dorchester County in Book of Conveyances 26, Page 41, Caroline F. Cone conveyed to Andrew N. Cone land described as "All that piece, parcel or tract of land, situate, lying and being in Burns Township in the County of Dorchester and State of South Carolina, Measuring and Containing 100 acres, more or less, being one-half (½) of a tract of 200 acres, more or less, formerly of Annie L. Tumbleston . . ." On the same day, by another Deed, Caroline F. Cone conveyed to J. M. Cone the 100 acre balance of the 200 acre tract. These two Deeds refer to the sources of title as being Mrs. [fol. 112] Annie L. Tumblestone, Rivers Nathaniel Tumblestone, Noel Tumblestone and Ida Matilda Viard, all of which will appear by reference to certified copies of these two Deeds attached hereto and marked, respectively, Exhibit "C" and Exhibit "D."

A further check of the records of Dorchester County discloses that in the year 1907 Deeds were executed and recorded whereby Rivers Nathaniel Tumblestone, Mrs. Annie L. Tumblestone, Noel Tumblestone and Ida Matilda Viard conveyed to Mrs. C. F. Cone, various parcels of land in Burns Township, containing in the aggregate 209 acres. Certified copies of these Deeds are hereto attached marked, respectively, Exhibit "E," Exhibit "F," Exhibit "G" and Exhibit "H." The records of Dorchester County also disclose that by Deed dated De-

cember 30, 1909, recorded in the Office of the Clerk of Court for Dorchester County in Book of Conveyances 15, Page 25, there is a Deed from Charles H. Tumblestone to Mrs. C. F. Cone for 50 acres of land in Burns Township. A certified copy of this deed is hereto attached, marked Exhibit "I." The records do not disclose any conveyances by Caroline F. Cone with respect to the Tumblestone tract after it was acquired by her, except for the conveyances to Andrew N. Cone and J. M. Cone above mentioned.

Upon the tax records in the possession of the Auditor of Dorchester County, there appear for the years 1915 and 1916 on pages captioned "Burns S. D. No. 11," entries showing 255 acres to be taxable in the name of C. F. Cone, 69 acres in the name of A. N. Cone and no property in the name of J. M. Cone. Upon the similar records for 1917 and 1918 there are entries showing 55 acres (50 acres in 1918) in the name of C. F. Cone, [fol. 113] 100 acres in the name of Joe Cone and 169 acres in the name of Andrew N. Cone. A certificate of the Auditor of Dorchester County is hereto attached and marked Exhibit "J."

The deeds and tax records make it very clear that Caroline F. Cone acquired 255 (or 250) acres of the Tumblestone lands in Burns Township prior to 1915 and that she divided 200 acres of these lands between Andrew N. Cone and J. M. Cone in the latter part of 1916. There can be no doubt but that the property taxed as 55 acres in 1917 and as 50 acres in 1918, 1919 and 1920 in the name of Caroline F. Cone in Burns Township was a part of the Tumblestone tract and had no relation to the property at issue in this action, despite the testimony given on behalf of the Plaintiff to try to show the contrary. The deed to Andrew N. Cone also disproves his sworn assertion that he had no knowledge of lands owned by his mother, Caroline F. Cone, in Burns Township other than the 106.5 acres involved in this action.

Charles W. Waring.

Sworn to before me this 26th day of July, A. D. 1945.
S. P. Dent, Notary Public for South Carolina. (Seal)

[fol. 114] EXHIBIT "A" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

To All to Whom These Presents May Concern:

I, Miles Cone of Dorchester County, in the State aforesaid, send Greeting:

Whereas I the said Miles Cone am indebted to J. H. Cone in and by my certain Bond or obligation, bearing date this 17th day of July, 1928, for the principal sum of Three Hundred and Seventy no/100 ($370.00) Dollars conditioned to pay to said J. H. Cone his certain Attorneys, Executors, Administrators, or Assigns the sum aforesaid with interest from the date thereof, at the rate of 8% per cent per annum, payable annually, until the said principal sum shall have been fully paid; to make all payments both principal and interest, in United States Gold Coin of the present standard of weight and fineness, or its equivalent, at the option of the obligee; that interest not paid when due shall become a part of the principal sum and bear interest at the rate of 8% per cent per annum until such interest and principal shall have been fully paid; to pay all costs, expenses, disbursements and Attorney's fees incurred in the collection thereof; the Attorney's fees to be equal to 25% per cent of the whole amount due thereon at the time of the payment thereof; all of which in and by said bond and the conditions and covenants therein contained reference being thereunto had will more fully appear.

Now, Know All Men, that I the said Miles Cone in consideration of the said debt and bond aforesaid and for the [fol. 115] better securing the payment thereof, and the performance of the covenants herein contained, to the said J. H. Cone according to the conditions of the said bond, and also in consideration of the further sum of three dollars to me the said Miles Cone in hand well and truly paid by the said J. H. Cone at and before the sealing and delivery of these Presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said J. H. Cone

All of that piece or parcel of land situated in St. Paul's Parish Dorchester County and State afore-

said Containing Two hundred and forty eight acres more or less, and bound*ing* on the North by lands of A. S. J. Perry, on the South by the Estate of Perry, on the West by lands of Franklin Cone, and on the East by lands of John Cone, formerly known as the Josiah Perry Estate.

Also all of that piece of land lying and being in St. Pauls Parish Dorchester County State aforesaid Containing Seventy two acres more or less. Bounded as follows: on the North by lands of A. S. J. Perry, on the South by lands of A. Miles Cone, on the East by above mentioned tract of 248 acres and on the West by Franklin Cone formerly A. Willis but conveyed to A. M. Cone. The same being recorded Walterboro, S. C. in Book 7 page 282 conveyed to me by A. Miles Cone.

Together with all and singular the rights, members, Hereditaments and Appurtenances to the said premises [fol. 116] belonging, or in anywise incident or appertaining.

To Have and to Hold all and singular the said premises before mentioned unto the said J. H. Cone his Heirs and Assigns forever.

And I do hereby bind myself my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said J. H. Cone, his Heirs and Assigns, against me and my Heirs, and all persons lawfully claiming or to claim the same or any part thereof.

Provided always, nevertheless, and it is the true intent and meaning of the parties to these Presents that if I, the said Miles Cone do, and shall well and truly pay, or cause to be paid unto the said J. H. Cone the said debt or sum of money aforesaid, with the interest thereon, if any shall be due, and shall perform the covenants herein contained, according to the true intent and meaning of said bond and this mortgage, then this Deed of bargain and sale shall cease, determine and be utterly null and void; otherwise it shall remain in full force and virtue.

2: And it is further agreed, that the said Miles Cone shall pay, as the same may become due, all taxes by whatever authority legally imposed upon the property

hereby mortgaged; and in case he shall at any time neglect or fail so to do, then the said J. H. Cone may pay such taxes and reimburse himself for the same, with interest at the rate of 8% per cent per annum and that the same shall stand secured by this mortgage.

3. And it is further agreed, that the said Miles Cone his agents and tenants, shall keep the aforesaid premises in as good order and condition as they now are, and [fol. 117] not commit waste, or cut timber thereon to such an extent as to impair the value of the same as security for the said loan.

4. And it is further agreed, that in case default of payment under any of the conditions of said bond or failure to perform any of the covenants of this mortgage for the space of thirty consecutive days, the whole amount of principal shall become due.

And it is further agreed, that the said Miles Cone shall hold and enjoy the said premises until default of payment, as provided in said bond, or a breach of some of the covenants of this mortgage.

Witness my hand and seal this 17 day of July in the year of our Lord one thousand nine hundred and 28, and in the one hundred and 53 year of the Sovereignty and Independence of the United States of America.

/s/ Miles Cone (Seal).

Signed, Sealed and Delivered in the Presence of /s/ S. B. Hill, T. M. Reeves.

STATE OF SOUTH CAROLINA,
County of Colleton.

Personally appeared before me S. B. Hill and made oath that he saw the within named Miles Cone sign, seal, and as his act and Deed, deliver the within written [fol. 118] Deed, and that he with T. M. Reeves witnessed the execution thereof.

/s/ S. B. Hill.

Sworn to before me this 17 day of July, 1928. /s/ T. M. Reeves (L.S.), Magistrate. Recorded July 18, 3 P. M., 1928.

STATE OF SOUTH CAROLINA,
County of Dorchester.

For value received I J. H. Cone do hereby assign transfer and set over to D. L. Cone his Heirs and Assigns the mortgage of real estate of Miles Cone.

In witness whereof I the said J. H. Cone have hereunto set my hand and seal this the 20th day of December A. D. 1930.

/s/ J. H. Cone.

Signed, Sealed and Delivered in the Presence of: /s/ E. C. Bryant, J. H. Bryant.

STATE OF SOUTH CAROLINA,
County of Dorchester.

Personally appeared before me E. C. Bryant who being duly sworn says that he saw the above named J. H. Cone [fol. 119] sign, seal and as his act and deed deliver the foregoing assignment of mortgage and the debt secured thereby and that he with J. H. Bryant witnessed the execution thereof.

Sworn to before me this 20th day of December A. D. 1930. /s/ J. H. Bryant, Clerk of Court Dor. Co. Satisfied this 16th day of Jan. 1932.

/s/ D. L. Cone.

Witness /s/ L. W. Reeves, Edwin E. Neese

Personally appeared before me L. W. Reeves who being duly sworn says that he saw D. L. Cone sign the Satisfaction of this Mortgage cancelling the debt secured thereby and that he with Edwin E. Neese witnessed the execution thereof.

/s/ L. W. Reeves.

Sworn to before me this 16th day of January, 1932. /s/ T. M. Reeves, Magistrate.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Mortgage from Miles Cone to J. H.

[fol. 120] Cone as recorded in Book of Mortgages 34 at page 126.

J. H. Bryant, Clerk of Court for Dorchester County, S. C.

St. George, S. C., July 25th, 1945.

EXHIBIT "B" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men By These Presents, That I, Miles Cone in the State aforesaid Colleton County in consideration of the sum of Five and no/100 ($5.00) Dollars and love and affection for son to me in hand paid at and before the sealing of these presents by Owen C. Cone in the State of Florida the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Owen C. Cone, his heirs and assigns:

All that piece, parcel or tract of land situate, lying and being in Dorchester County, South Carolina, containing three hundred and twenty (320) acres, more or less, and bounded as follows: North by lands of Cooper River Timber Company, formerly J. Lamb Perry: East by lands of Cooper River Timber Company, formerly John Cone: South by lands of Cooper River Timber Company, formerly Jim Perry: West [fol. 121] by lands of Owen C. Cone. Being the same lands conveyed to Miles Cone by A. M. Cone by deed dated September 19, 1888, recorded October 6, 1888, in the R. M. C. office for Colleton County, S. C. in Book 7, at Page 282, but now being in Dorchester County, S. C. the said lands having been described in the said deed as two tracts, one of 248 acres and the other of 72 acres, both tracts adjoining and forming one body containing 320 acres, more or less.

Together with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises, belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said prem-

ises before mentioned, unto the said Owen C. Cone, his Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, my Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said Owen C. Cone, his Heirs and Assigns, against me and my Heirs, and all other persons lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal this 11th day of January in the year of our Lord one thousand nine hundred and thirty-two and in the one hundred and fifty-sixth year of the Sovereignty and Independence of the United States of America.

/s/ Miles Cone (L.S.)

Signed, Sealed and Delivered in the Presence of /s/ J. C. Lemacks, Maude Ayer.

[fol. 122] STATE OF SOUTH CAROLINA,
Colleton County.

Personally appeared before me Maude Ayer and made oath that she saw the within named Miles Cone sign, seal and as his act and deed, deliver the within written Deed; and that she with J. C. Lemacks witnessed the execution thereof.

/s/ Maude Ayer.

Sworn to before me, this 11th day of January A. D. 1932. /s/ J. C. Lemacks (Seal), Notary Public for S. C. No Dower. Grantor a widower.

Filed 27 day of January 11 A. M. A. D. 1932, and recorded in Book 53 Page 227.

/s/ J. H. Bryant, R. M. C. or Clerk Court C.P.&G.S. Dorchester County, S. C.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Miles Cone to Owen C. Cone as recorded in Book of Conveyances 53 at Page 227.

J. H. Bryant, Clerk of Court for Dorchester County, S. C.

St. George, S. C. May 31st, 1945.

[fol. 123] EXHIBIT "C" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,

Know All Men By These Presents, That I, Caroline F. Cone of Burns Township in the County of Dorchester in the State aforesaid for and in consideration of the sum of Five Dollars and other considerations Dollars, to me in hand paid at and before the sealing of these Presents, by Andrew N. Cone in the State aforesaid (the receipt whereof is hereby acknowledged), have granted, bargained, sold, and released, and by these Presents do grant, bargain, sell and release unto the said Andrew N. Cone

All that piece, parcel, lot or tract of land, situate, lying and being in Burns Township in the County of Dorchester and State of South Carolina, Measuring and Containing one hundred Acres more or less, being One half of a tract of Two hundred Acres more or less, formerly the Annie L. Tumbleston lands: Butting and Bounding to the Northwest on lands said to be of the Estate of Rice and now or formerly of Mrs. Lizzie Cooper, to the Northeast and East on lands now or formerly of Dolton and lands now or formerly of J. Lamb Perry, to the South on lands now or formerly of Charles Tumbleston, and to the West on lands of the Estate of Benjamin Sauls known as the Morelands and lands now or late of the Tumbleston estate. The same having such marks, metes, boundaries, delineations and dimensions as a plat of said lands, made by James A. Postell, [fol. 124] Surveyor, on the 11th day of December, 1908, will more fully show. The same having been conveyed to me in various tracts or portions by Mrs. Annie L. Tumbleston by Deed bearing date April 13, 1907, recorded in Clerk of Court's office Dorchester County in Book 10, Page 283: Rivers Nathaniel Tumbleston by Deed dated April 11th, 1907, recorded in Book 10, page 284; by Noel Tumbleston by Deed dated April 27th, 1907, recorded in Book 11, page 50; by Ida Matilda Viard by Deed dated June 21, 1907, recorded in Book 12, page 2.

Together with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said Premises before mentioned unto the said Andrew N. Cone Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and forever defend all and singular the said Premises unto the said Andrew N. Cone, his Heirs and Assigns, against me and my Heirs and all other persons lawfully claiming, or to claim, the same or any part thereof.

Witness my Hand and Seal, this Second day of December in the year of our Lord one thousand nine hundred and sixteen and in the one hundred and forty [fol. 125] first year of the Sovereignty and Independence of the United States of America.

/s/ Caroline F. Cone (L.S.).

Signed, Sealed and Delivered in the Presence of /s/ Charlie Radcliffe, W. S. Harmon.

THE STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Charlie Radcliffe and made oath that he saw the within named Caroline F. Cone sign, seal and as her act and deed, deliver the within written Deed; and that he with W. S. Harmon witnessed the execution thereof.

Sworn before me, this second day of December A. D. 1916

/s/ Charlie Radliffe.

/s/ S. P. Driggers (L.S.), Notary Public for S. C. (Notarial Seal), Recorded January 20th, 1917.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a [fol. 126] true copy of a Deed from Caroline F. Cone to Andrew N. Cone as recorded in Book of Conveyances 26, page 41.

J. H. Bryant, Clerk of Court for Dorchester County, S. C.

St. George, S. C., July 25th, 1945.

EXHIBIT "D" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,

Know All Men by These Presents, That I, Caroline F. Cone, of Burns Township, in the County of Dorchester in the State aforesaid for and in consideration of the sum of Five Dollars and other considerations to—in hand paid at and before the sealing of these Presents, by J. M. Cone in the State aforesaid (the receipt whereof is hereby acknowledged), have granted, bargained, sold, and released, and by these Presents do grant, bargain, sell and release unto the said J. M. Cone

All that piece, parcel, lot or tract of land situate, lying and being in Burns Township in the County of Dorchester, and State of South Carolina, measuring and containing One hundred (100) acres more or less, being the Southern half of a tract of Two Hundred (200) acres, more or less, formerly the Annie L. Tumbleston land: Butting and Bounding to the North on land said to be of the Estate of Rice and now or formerly of Mrs. Lizzie Cooper, to the Northeast and East on lands now or formerly of Dalton and lands now or formerly of J. Lamb Perry, to the [fol. 127] South on lands now or formerly of Charles Tumbleston, and to the West on lands of Estate of Benjamine Sauls known as the Moore land and lands now or late of the Tumbleston estate. The same having such marks, metes bounds delineations and dimensions, as a plat of said land made by James A. Postell, Surveyor, on the 11th of December, 1908 will more fully show. The same having been conveyed to me in various tracts or portions by Mrs. Annie L. Tumbleston by deed bearing date April 13, 1907, recorded in Clerk of Court's Office Dorchester County in Book 10 page 283, by Rivers Nathaniel Tumbleston by deed dated April 11, 1907, recorded in Book 10, page 284, by Noel Tumbleston by deed dated April 27, 1907 recorded in Book 11, page 50, by Ida Matilda Viard by deed dated June 21, 1907, recorded in Book 12, Page 2.

Together with, all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said Premises before mentioned unto the said J. M. Cone his Heirs and Assigns, forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and forever defend all and singular the said Premises unto the said J. M. Cone, his Heirs and Assigns, against me and my Heirs and all other persons lawfully claiming, or to claim, the same or any part thereof.

[fol. 128] Witness my Hand and Seal this second day of December in the year of our Lord one thousand nine hundred and Sixteen and in the one hundred and forty-first year of the Sovereignty and Independence of the United States of America.

/s/ Caroline F. Cone (L.S.)

Signed, Sealed and Delivered in the Presence of /s/ Charlie Radcliffe, W. S. Harmon.

THE STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Charlie Radcliffe and made oath that he saw the within named Caroline F. Cone sign, seal and as her act and deed, deliver the within written Deed; and that he with W. S. Harmon witnessed the execution thereof.

/s/ Charlie Radcliffe.

Sworn before me, the second day of December A. D. 1917. /s/ S. P. Driggers (L.S.) Notary Public for S. C. Recorded August 17th, 1917.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the fore-[fol. 129] going is a true copy of a Deed from Caroline F. Cone to J. M. Cone as recorded in Book of Conveyances 26, page 242.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., Official Seal.

St. George, S. C. July 25th, 1945.

EXHIBIT "E" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men by These Presents, That I, Rivers Nathaniel Tumblestone of Burns Township, County of Dorchester (formerly Colleton County) in the State aforesaid in consideration of the sum of Fifty Dollars to me in hand paid at and before the sealing of these Presents, by Mrs. C. F. Cone, wife of Miles Cone, of Dorchester County in the State aforesaid (the receipt whereof is hereby acknowledged) have granted, bargained, sold and released, and by these Presents do grant, bargain sell and release unto the said Mrs. C. F. Cone

50 acres of land in all that tract of land, lying, situated and being in the County of Dorchester, formerly Colleton County, in the State aforesaid Containing Four Hundred (400) acres, be the same more or less and bounded as follows to wit: On the North by lands said to belong to Mrs. Lizzie Cooper wife of [fol. 130] Hon. M. R. Cooper; on the East by lands said to belong to J. Lamb Perry; on the South by lands said to belong to Mrs. Moore, known as the H. T. Spell property and on the West by lands said to belong to the Estate of Boyd now owned by George H. Muckenfuss, as will more fully show by reference to a plat of the said tract of land and by a conveyance made by Mrs. Annie L. Tumblestone to Mrs. C. F. Cone and myself of date April, 1907.

Togther with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular the said premises above mentioned unto the said Mrs. C. F. Cone, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Mrs. C. F. Cone, her Heirs and Assigns, against me and my Heirs or any person or persons lawfully claiming, or to claim the same, or any part thereof.

Witness my hand and seal this 11th day of April, in the year of our Lord one thousand nine hundred and

seven and in the one hundred and 31st year of the Sovereignty and Independence of the United States of America.

/s/ Rivers Nathaniel Tumblestone, (L.S.)

Signed, Sealed and Delivered in the Presence of /s/ Miles Cone, J. B. Bivens.

[fol. 131] STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Miles Cone and made oath that he saw the within named Rivers Nathaniel Tumblestone sign, seal and as his act and deed, deliver the within written Deed; and that he with J. D. Bivens witnessed the execution thereof.

/s/ Miles Cone.

Sworn to before ~~me this~~ 11th day of April, A. D. 1907. /s/ John D. Bivens (L.S.), Notary Public for S. C. Recorded April 23rd, 1907.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Rivers Nathaniel Tumblestone to Mrs. C. F. Cone, as recorded in Book of Deeds No. 10, Page 284.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., Official Seal.

St. George, S. C. July 25th, 1945.

[fol. 132] EXHIBIT "F" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men by These Presents, That I, Mrs. Annie L. Tumblestone, of Burns Township, Dorchester County (formerly Colleton County), in the State aforesaid in consideration of the sum of One hundred Dollars to me in hand paid at and before the sealing of these Presents, by

Rivers Nathaniel Tumblestone and Mrs. C. F. Cone of the County of Dorchester in the State aforesaid (the receipt whereof is hereby acknowledged) have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Rivers Nathaniel Tumblestone and Mrs. C. F. Cone

One Hundred acres of land in all that tract of land situate, lying and being in the County of Dorchester, State aforesaid containing four (400) hundred acres, more or less, and bounded as follows to wit: On the North by lands said to belong to Mrs. Lizzie Cooper, wife of Hon. M. R. Cooper; on the East by lands said to belong to J. Lamb Perry; on the South by lands said to belong to Mrs. Moore known as H. T. Spell property; and on the West by lands said to belong to Estate Boyd, now owned by George H. Muckenfuss, as will more fully show by reference to a plat of the said tract of land.

Together with all and singular the Rights, Members, Hereditaments and Appurtenances to the said [fol. 133] Premises belonging, or in anywise incident or appertaining.

To Have and to Hold all and singular the said premises above mentioned unto the said Rivers Nathaniel Tumblestone and Mrs. C. F. Cone, their Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Rivers Nathaniel Tumblestone and Mrs. C. F. Cone, their Heirs and Assigns, against me and my Heirs or any person or persons lawfully claiming, or to claim the same, or any part thereof.

Witness my hand and seal this 13th day of April in the year of our Lord one thousand nine hundred and seven and in the one hundred and 31st year of the Sovereignty and Independence of the United States of America.

/s/ Mrs. Annie L. Tumblestone (L.S.), X—her mark

Signed, Sealed and Delivered In the Presence of /s/ Miles Cone, G. H. Muckenfuss

STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Miles Cone and made oath that he saw the within named Mrs. Annie L. Tumblestone sign, seal and as her act and deed, deliver [fol. 134] the within written Deed; and that he with George H. Muckenfuss witnessed the execution thereof.

/s/ Miles Cone.

Sworn to before me this 15th day of April, A. D. 1907. /s/ John D. Bivens (L.S.), Notary Public for S. C. Recorded April 23rd, 1907

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Miles Cone to J. H. Cone as recorded in Book of Deeds 10, at Page 283.

J. H. Bryant, Clerk of Court for Dorchester County, S. C.

St. George, S. C., July 25th, 1945.

EXHIBIT "G" TO AFFIDAVIT

NOEL TUMBLESTON TO MRS. C. F. CONE

THE STATE OF SOUTH CAROLINA:

Know All Men by These Presents, That I, Noel Tumbleston of the City of Charleston S. C. in the State aforesaid Farmer, in consideration of the sum of [fol. 135] fifty Dollars to me in hand at and before the sealing of the presents, by Mrs. C. F. Cone, of Dorchester County, in the State aforesaid, the receipt whereof is hereby acknowledged, have granted bargained sold and released and by these presents do grant, bargain sell and release unto the said—Mrs. C. F. Cone—

All my right title claim and interest consisting of fifty (50) acres, be the same more or less, in all that piece parcel or tract of land, lying being and situate in Burns Township Dorchester County, formerly Colleton County, in the State aforesaid Measuring

and Containing Four hundred (400) acres, be the same more or less, and bounded as follows, on the North by lands said to belong to Mrs. Lizzie Cooper, wife of Hon. M. R. Cooper; East on lands said to belong to J. Lamb Perry; on the South by lands said to belong to Mrs. Moore, formerly owned by H. F. Spell and on the West by lands said to belong to Estate of Boyd now owned by George H. Muckenfuss, as will more fully appear by a reference to a plat of the said property.

Together with all and singular the Rights, Members, Hereditaments and Appurtenances, to the said premises belonging or in anywise incident or appertaining.

To Have and to Hold all and singular the said premises before mentioned unto the said Mrs. C. F. Cone, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Assigns, to warrant and defend all and singular the said premises unto the said Mrs. C. F. Cone, and her [fol. 136] Heirs and Assigns against me and my Heirs or any person or persons lawfully claiming or to claim the same or any part thereof.

Witness my Hand and Seal this 27th day of April in the year of our Lord one thousand nine hundred and seven and in the one hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

/s/ Noel Tumbleston.

Signed, Sealed and Delivered in the Presence of /s/. D. M. Winter, E. D. Knight.

The State of South Carolina,
Dorchester County.

Personally appeared before me D. M. Winter and made oath that he saw the within named Noel Tumbleston sign, seal and as his Act and Deed, deliver the within written Deed; and that he with E. D. Knight witnessed the execution thereof.

/s/ D. M. Winter.

Sworn to before me this 27th day of April A. D. 1907. T. M. Finucan, Notary Public S. C. (Notarial Seal).

[fol. 137] THE STATE OF SOUTH CAROLINA,
Dorchester County.

I, John D. Bivens, a Notary Public for S. C. do hereby certify unto all whom it may concern that Mrs. Rosa Tumbleston, the wife of the within named Noel Tumbleston, did this day appear before me and upon being privately and separately examined by me, did declare that she does freely voluntarily, and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named Mrs. C. F. Cone, Her Heirs and Assigns, all her interest and estate, and also all right and also all her right and claim of Dower, of, in or to all and singular the premises within mentioned and released.

Given under my Hand and Seal this 16th day of May *Anno Domini* 1907.

Mrs. Rosa X Tumbleston.

/s/ John D. Bivens (L.S.), Notary Public for S. C. Recorded May 20th, 1907.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Noel Tumbleston to Mrs. [fol. 138] C. F. Cone as recorded in Book of Conveyances 11, page 50.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., (Official Seal).

St. George, S. C., July 25th, 1945.

EXHIBIT "H" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men by These Presents, That I, Ida Matilda Viard of Colleton County in the State aforesaid in consideration of the sum of Fifty Dollars to me in hand paid at and before the sealing of these Presents, by Mrs.

C. F. Cone of the County of Dorchester in the State aforesaid (the receipt whereof is hereby acknowledged) have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Mrs. C. F. Cone of Dorchester County,

> All my right, title, claim and interest consisting of fifty (50) acres, be the same more or less, in all that piece, parcel or tract of land lying, being and situated in Burns Township, Dorchester County, formerly Colleton County, in the State aforesaid—measuring and containing Four (400) hundred acres, be the same more or less, and bounded as follows: On the North by lands said to belong to Mrs. Lizzie Cooper, wife of Hon. M. R. Cooper, on the East by lands [fol. 139] said to belong to J. Lamb Perry, on the South by lands said to belong to Mrs. Moore and formerly owned by Henry T. Spell, and on the West by lands said to belong to Estate of Boyd, now owned by George H. Muckenfuss, as will more fully appear by reference to a "plat" of the said property.

Together with all and singular the Rights, Members Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular the said Premises, before mentioned unto the said Mrs. C. F. Cone, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said Premises unto the said Mrs. C. F. Cone, her Heirs and Assigns, against me and my Heirs or any person or persons lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal, this 21st day of June in the year of our Lord one thousand nine hundred and seven and in the one hundred and 31st year of the Sovereignty and Independence of the United States of America.

/s/ Ida Matilda Viard (L.S.)

Signed, Sealed and Delivered in the presence of /s/ Miles Cone, /s/ C. H. Tumbleston, X—his mark

[fol. 140] THE STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Miles Cone and made oath that he saw the within named Ida Matilda Viard sign, seal and, as her act and deed, deliver the within written Deed; and that he with C. H. Tumbleston witnessed the execution thereof.

/s/ Miles Cone.

Sworn before me, this 21st day of June A. D. 1907. (L.S.) J. D. Bivens (Seal), Notary Public for S. C. Recorded July 1st, 1907.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Ida Matilda Viard to Mrs. C. F. Cone as recorded in Book of Conveyance 12, page 2.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., Official Seal.

St. George, S. C. July 25th, 1945.

[fol. 141] EXHIBIT "I" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
Dorchester County.

Know All Men by These Presents, That I, Charles H. Tumbleston of Burns Township, County of Dorchester formerly Colleton County, in the State aforesaid Farmer in consideration of the sum of One Hundr 1 Dollars to me in hand paid at and before the sealing of these Presents, by Mrs. C. F. Cone of Dorchester County, in the State aforesaid (the receipt whereof is hereby acknowledged), have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Mrs. C. F. Cone

All my right title claim and interest in the estate of Mrs. Annie L. Tumbleston measuring and containing fifty acres (50) acres, more or less, In all that tract of land lying being and situated, in the County of Dorchester formerly Colleton County, in the

State aforesaid, Measuring and Containing four (400) hundred acres, be the same more or less, and bounded as follows: On the North by lands said to belong to Mrs. Lizzie Cooper, wife of Hon. M. R. Cooper; On the East by lands said to belong—J. Lamb Perry; On the South by lands said to belong to Mrs. Moore known as the H. T. Spell property, and on the West by lands said to belong to the Estate of Boyd Bros, Now owned by Geo. H. Muckenfuss, as will more fully show by reference to a plat of the lands.

[fol. 142] Together with, all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said Premises before mentioned unto the said Mrs. C. F. Cone, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and forever defend all and singular the said Premises unto the said Mrs. C. F. Cone, her Heirs and Assigns against me and my Heirs or any person or persons lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal, this 30th day of December in the year of our Lord one thousand nine hundred and nine, and in the one hundred and 34th year of the Sovereignty and Independence of the United States of America.

/s/ Charles H. Tumbleston (L.S.), X—his mark.

Signed, Sealed and Delivered in the Presence of /s/ A. N. Cone, J. D. Bivens.

The State of South Carolina,
Dorchester County.

Personally appeared before me A. N. Cone and made oath that he saw the within named Charles H. Tumbleston sign, seal and as his act and deed, deliver the within [fol. 143] written Deed; and that he with J. D. Bivens witnessed the execution thereof.

/s/ A. N. Cone.

Sworn before me, this 30th day of December A. D. 1909.
/s/ Jno. D. Bivens (Seal), Notary Public S. C.

THE STATE OF SOUTH CAROLINA,
Dorchester County.

I, John D. Bivens a Notary Public S. C. do hereby certify unto all whom it may concern, that Mrs. F. L. Tumbleston the wife of the within named Charles H. Tumbleston did this day appear before me and, upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named Mrs. C. F. Cone, her Heirs and Assigns all her interest and estate, and also all her right and claim of Dower, of, in, or to all and singular the premises within mentioned and released.

Given under my hand and seal, this 30th day of December *Anno Domini* 1909.

/s/ Fannie L. Tumbleston (L.S.)

/s/ Jno. D. Bivens (L.S.), Notary Public S. C. Recorded Jan. 3rd, 1910.

[fol. 144] STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Charles H. Tumbleston to Mrs. C. F. Cone as recorded in Book of Conveyance 15, page 26.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., Official Seal.

St. George, S. C. July 25th, 1945.

EXHIBIT "J" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

CERTIFICATE

I, the undersigned, H. J. Patrick, Auditor for Dorchester County, South Carolina, do hereby certify that the following appears upon the tax records under my

supervision and care in the County Court House of Dorchester County:

1915	Burns School District No. 11	Mrs. C. F. Cone	255 acres Pd
1916	" " " "	"	" "
1917	" " " "	"	55 acres "
1918	" " " "	"	50 acres "
1915	Burns School District No. 11	Andrew M. Cone	69 acres Pd
1916	" " " "	"	" "
1917	" " " "	"	169 acres "
1918	" " " "	"	" "
1915	Burns School District No. 11	(No entry for J. M. or Joe Cone)	
1916	" " " "	"	"
1917	" " " "	Joe Cone	100 acres Pd
1918	" " " "	J. M. Cone	" "

[fol. 145] Given under my hand and seal at St. George, South Carolina, this 25th day of July, 1945.

/s/ H. J. Patrick. H. J. Patrick, as Auditor of Dorchester County, South Carolina.

Mr. C. W. Waring, Charleston, S. C.

Dear Mr. Waring:

Please notice notations above the years 1915-16 on the tax books was C. F. Cone, In 1915-16 was Andrew M., 1917 was Andrew N.—1918 was A. N.—1918 was J. M. Hoping this will be the required information.

Sincerely yours, /s/ H. J. Patrick.

STATE OF SOUTH CAROLINA,
County of Charleston.

Personally appeared before me Charles W. Waring who, being duly sworn, deposes and says as follows:

I am one of the attorneys for the defendant in the above entitled cause.

Within ten days after the date of the trial herein I went to St. George, South Carolina and made a further examination of the public records for the purpose of discovering whether any documentary or record evidence existed to substantiate or to disprove that Miles C. Cone conveyed to Caroline F. Cone the property which is the subject of this action. The reason for this addi-
[fol. 146] tional search was to learn the true situation concerning this surprising oral and unsubstantiated evi-

dence offered by the plaintiff at the trial to show the basis for his ownership of the property and without which testimony he cannot recover in the action. It was as a result of this examination that there was discovered the new evidence mentioned in the affidavit and shown by the exhibits thereto attached.

On May 29, 1945 this deponent requested Mrs. Walter Wallace, the Court Stenographer in this trial, to furnish as quickly as possible a copy of the transcript of the record therein. By reason of an accumulation of work, or from some other cause, Mrs. Wallace did not deliver this transcript of record until July 11, 1945 and hence deponent was not able to complete preparations for a motion for new trial until this time.

Deponent has used all due diligence in attempting to bring before the Court the newly discovered evidence mentioned and shown by the affidavit and exhibits hereto attached.

Charles W. Waring.

Sworn to before me this 26th day of July, 1945. Clarence B. Pearce (L. S.), Notary Public for South Carolina

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OPINION AND ORDER

In the above entitled cause defendant has moved for a new trial upon the ground of newly discovered evidence in accordance with Rule 59 (b) of the Rules of [fol. 147] Civil Procedure. The matter was considered at a single hearing upon motion to grant leave and also upon the merits. I have carefully examined the grounds of the motion, the affidavits filed and have heard arguments, especially on the matter of whether the defendant has shown due diligence.

This case was originally instituted in the Court of Common Pleas for Colleton County and was removed to the federal court because of diversity of citizenship. After a preliminary motion, an amended complaint and an answer was filed; and thereafter pretrial conferences were held in January 1945. At one of these conferences it was agreed that the deed of Caroline F. Cone to A. N. Cone (recorded September 18, 1920, in Book

35, page 288, Dorchester County), should be admitted in evidence without further proof and the deed was left on file with the Clerk. This gave information as to the alleged source of title of the plaintiff. Counsel also agreed that they would meet at St. George, S. C. (the county seat of Dorchester County), and together check over the records pertaining to tax payments and other matters affecting the property in litigation. The case was not tried at the January term of court owing to the illness of the plaintiff, but it was then announced that it would be definitely tried at the May term. On May 21st the case was commenced before a jury and plaintiff's testimony was concluded that day and the defendant introduced certain testimony. The next day the defendant continued with its testimony and the case was concluded in the afternoon and resulted in a verdict of $15,000.00 for the plaintiff. It will be noted that in the motion for a new trial the defendant claims that it [fol. 148] was taken by surprise by certain evidence introduced by the plaintiff as to his title. The defendant, however, was fully cognizant of the fact that the plaintiff claimed through a conveyance from his mother, Caroline F. Cone, since that deed was actually offered in evidence at the pretrial conference. The defendant was also on notice that the plaintiff intended to introduce a deed of A. Miles Cone to Miles Cone dated September 19, 1888. At the trial testimony was introduced as to a lost deed conveying the property from Miles Cone to Caroline F. Cone, and the plaintiff claimed that her source of title was the deed above referred to. The defendant now states that it was taken by surprise and thought that this deed was to be introduced for other purposes and this is given as an excuse for not examining the records of Dorchester County to ascertain conveyances to and from the members of the Cone family, and particularly conveyances out of Caroline F. Cone.

It would appear to me that when this suit was instituted and when the defendant was put on notice that the plaintiff was basing his title upon an alleged deed from his mother, Caroline F. Cone, which was on record, and of which it had full knowledge, that the barest caution would have called for a complete examination of all real estate transactions of Caroline F. Cone, not only for

property going into her, but for property conveyed out by her. There is no allegation or showing that these records were difficult to search or that they were not properly indexed or could not be found. There is no witness who was then absent and now located who knew of these things and called attention to them. All of the information was stored in the records of Dorchester County and the defendant being put on notice that the [fol. 149] plaintiff would claim title through Caroline F. Cone failed to check the records as to her. It appears to me that the search made of the records ten days after the trial should have been made many months before the trial and I do not find that due diligence was exercised.

In defendant's argument much was said as to the tax records in the Auditor's office. These records of course are not convincing proof as to title, though they throw some collateral light on the subject. As a matter of fact, all of the testimony as to title was vague and uncertain. The defendant itself attempted to prove title and yet there was a hiatus of many years duration wherein this property did not appear in its name on the tax books. In the defendant's attempt to prove title its showing of the acreage it obtained did not at all coincide with that shown on the plat. The surveyor who made the compiled plat of this and other contiguous properties was not called although there was no showing that he could not be located.

As a matter of fact, as above stated, the matter of title was not clearly proved by either plaintiff or defendant and the main point argued to the jury was that of possession. And that in my opinion was the most important point in the case because the cause of action was based primarily upon an alleged trespass on the property which the plaintiff claimed was in his possession.

It is true that this evidence now shown, if introduced at the trial, should have been helpful to the defendant since it would have rendered more doubtful the proof of legal title by the plaintiff. But plaintiff did not have to prove perfect legal title. He could rely on legal possession. The main point submitted to the jury was [fol. 150] who was in lawful possession, and there was conflicting evidence.

In almost any case counsel can review the trial and

find where a stronger case might have been made and additional evidence might have been found. And that is true here. However, all of the facts now presented could readily have been found before the trial. If afterthoughts are to set aside verdicts there will be no end of litigation.

I am of the opinion that the defendant has failed to come within the rule of the showing of due diligence and the motion for a new trial will, therefore, be refused. Accordingly, it is

Ordered, that the motion for a new trial in the above entitled cause be and the same is hereby refused.

J. Waties Waring, United States District Judge.

Charleston, S. C., August 8, 1945.

[fols. 151-154] NOTICE OF APPEAL

Notice is hereby given that West Virginia Pulp and Paper Company, Defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Fourth Circuit from the final judgment entered in this action on June 5, 1945, and from the Order of the Honorable J. Waties Waring, United States District Judge, refusing the Defendant's motion for a new trial on the ground of newly discovered evidence, which said Order was filed in this cause on August 8, 1945.

D. A. Brockinton, Charles W. Waring, Waring & Brockinton, Attorneys for Defendant.

[fol. 155] **Appendix to Brief of Appellee**

Excerpts of Testimony of Witnesses

Portion of Direct Examination of JOHN D. HARRISON:

By Mr. Unger:

Q. How old are you?

A. Sixty-one (61). I was born on the place called Joe Ioor Waring. It was owned by the heirs of J. Ioor Waring and was originally bought by Mr. J. Lamb Perry.

Q. Is that plantation joining this 106 acres?
A. The canal was the dividing line.
Q. A canal was the dividing line?
A. It was wider between ..... Mr. Perry and Mr. Cone.
Q. A canal runs down by this tract of 106 acres?
A. Yes, sir.
Q. Is any name given, by hunters, for this section?
A. Raccoon Drive.
Q. Raccoon drive is along this canal?
A. Yes, sir.
Q. What kind of land is this 106 acres?
A. All swamp land.
Q. Is there any cultivated, any fields?
A. No, sir.
Q. Is there any place for anybody to live?
A. No, sir.
Q. That was Raccoon Drive and a canal runs through the center. How long is that canal?
A. I don't know, quite a good bit, I couldn't tell you exactly.
Q. The Waring plantation came down to this canal? Did this Waring ever go across that canal?
A. Not to my recollection.
Q. How long have you been living there?
A. I lived there—I moved off in 1915 or 1916, I ain't directly sure which one. I didn't take it down, I lived the balance of my life up to 1915. I rented this plantation from the Warings and Perry got it and I rented it from him.
Q. Do you know when you were born on that plantation?
A. In 1884.
Q. You knew Mr. J. Lamb Perry?
A. Really good.
Q. And he conveyed the Waring Plantation to the West Virginia Pulp & Paper Company?
A. Yes, sir.
Q. Were you ever hunting in there with Mr. Perry?
A. Yes, sir.
[fol. 156] Q. Did he ever make any statement to you concerning his holdings?

Objection by Mr. Waring: I object to that.
The Court: Stop. What is your purpose?

Mr. Unger: I want to ask if Mr. Perry, at the time he owned the land made any statements with reference to where he owned the land to, where his lines were.

The Court: What is the competency.

Mr. Unger: The statement of a former owner as to where a boundary was.

Mr. Waring: Your Honor, J. Lamb Perry is long since deceased and there is no way in which he could be consulted as to what he said and statements made by him prior to his death are utterly incompetent.

Q. John, when you rented this farm from Mr. Perry where did he tell you the line went?

A. To the canal.

Q. It went to the canal?

A. Yes, sir.

Q. Now, during the time you rented from the Warings and the time you rented from J. Lamb Perry have you ever heard of the Waring tract going across the south of that canal?

A. No, sir.

Q. Do you know whose land was south of that canal?

A. Whose land was on the south side? Now directly I couldn't say whose own, it was called "Cone Property". To know the distinction of each Cone, I don't know, there was a bunch of them in there had land down in there.

* * *

Q. How long has that drive been there?

A. Since old slavery time.

* * *

Q. Did you know Mr. Miles Cone?

A. Yes, sir.

Q. Did you ever hunt with him?

A. Yes, sir.

Q. Did Mr. Miles Cone, in your presence, ever make any statements concerning the ownership of this 106 acres?

A. Yes, he said Mr. A. N. Cone owned it.

Objection by Mr. Waring: I object, that is heresay.

The Court: I will let him say, objection overruled. Exception noted.

[fol. 157] By Mr. Waring:

Q. You said, I believe, that you were born on the War-

A. I was, sir.

Q. That plantation was Mr. Joseph Ioor Waring's plantation?

A. Right.

Q. Let me ask you this, what was the name of this plantation, didn't it have a name?

A. Hope Plantation, if I am not badly mistaken.

Q. Do you know how many acres were in the Hope Plantation?

A. Mr. Perry told me 500 acres, more or less in the plantation.

* * *

Portion of Direct Examination of ROBERT WILLIAMS (Colored):

By Mr. Unger:

Q. Robert, how old are you?

A. About 56 or 57, sir.

Q. Where do you live?

A. In Dorchester County.

Q. You live on the Perry plantation?

A. Yes, sir.

Q. That is the former J. Lamb Perry?

A. It was his property I am living on.

Q. You know Mr. J. Lamb Perry?

A. Yes, sir.

Q. You work for him?

A. Yes, sir, oh, yes, sir.

Q. Did you ever hunt with him?

A. Yes, sir.

Q. Do you know where Raccoon Drive is?

A. Yes, sir, I know where it called, it is called Raccoon Drive.

Q. Is there a canal right through that drive?

A. Yes, sir.

Q. You know where J. Lamb Perry's land ended?

Objection by Mr. Waring: I don't think he knows his land.

Q. Do you know where the land of J. Lamb Perry's land ended?

A. Yes, I know a canal is called the line in Raccoon Drive, I don't know neither corner nor neither end, sir.

Q. I am going to ask again as to the statement of this

former owner, J. Lamb Perry, based on the case of *Holden v. Candor.* (Quoting from case).

[fol. 158] The Court: I have allowed you to ask such a question but be very careful in framing it, as to whether Mr. Perry pointed out the lines of his property to him.

Q. How long have you lived on Mr. Perry's plantation?

A. I was born and raised there.

Q. How long did you work for him?

A. Several years, I wouldn't be able to tell you the number of years, but several years.

Q. From the time you were born until he died?

A. I was right there, yes sir.

Q. You are still working for his son, Edward Perry?

A. Yes, sir.

Q. How often did you go hunting with Mr. J. Lamb Perry?

A. About 15 years, I reckon 12 or 15 years.

Q. What did you hunt in Raccoon Drive?

A. Turkeys.

Q. While you were hunting in Raccoon Drive for turkeys, with Mr. J. Lamb Perry, did he make any statement as to where his property went to?

A. He said that canal was his boundary line, that was his boundary line by Burris Willis saying that. Mr. Burris Willis knew the land and told him that. Burris Willis was his foremost hunter.

Q. When you got to that canal did you hunt across it?

A. Well, now, I hunt on his property, but he would always—but this man would always take I and him in there and I knew the way in and out and he always told me to take him to his line and set him down. That is how I knowed that was called the line and I always carried him in there when Burris was absent. I always haul him to the line.

Q. Did——

A. (Interrupting) Burris told him that was his line there and that was the Cone property over there.

Q. That is all you know about it?

A. Yes, sir.

Portion of Direct Examination of FRANK GREEN (Colored)

By Mr. Unger:

Q. Did you know Mr. J. Lamb Perry?
A. Yes, sir.

Q. Did you ever hunt with Mr. J. Lamb Perry?
A. Yes, sir.
[fol. 159] Q. How many years have you been hunting with him?
A. I judge around about, I don't know exactly, but around about 12 or 13 years.
Q. Did you hunt with him in Raccoon Drive?
A. Yes, sir, I have hunted and been with him in Raccoon Drive.
Q. During his hunting expedition did he ever show you where his line was or make any statement?
A. Yes, sir, he told me that canal dam.

Objection by Mr. Waring: Same objection.
The Court: Objection overruled.

A. He carried me to a certain point, a canal dam, he told me that was the dividing of his line, he wouldn't go any further than that.
Q. He didn't go any further, did he say whose land was adjoining on the other side?
A. No, his land was north of that canal and he said Cone property was to the south of that.

Portion of Direct Examination of JULIA ANNE DRIGGERS:

By Mr. Unger:

Q. Have you ever done anything on this 106 acres?
A. Only hunted on it, that is all.
Q. How long have you been hunting on it?
A. I guess around three years, sir.
Q. By whose permission have you been hunting on that land?
A. Mr. Miles Cone gave us permission.
Q. Mr. Andrew Cone's father?
A. Yes, sir, that is right.
Q. Did he tell you whose it was?
A. Yes, he said it belonged to Mr. Andrew Cone.

Portion of Cross Examination of JULIA ANNE DRIGGERS:

By Mr. Waring:

Q. Mr. Miles Cone owned the land?
A. Yes, sir.

Portion of Direct Examination of H. H. JESSEN:

By Mr. Unger:

Q. Mr. Jessen, you are the Sheriff of Dorchester County?
A. Yes, sir.

[fol. 160] Q. Now, in 1942 you had a tax sale for sale of delinquent taxes?
A. Yes, sir.
Q. State whether or not in Burnes School District #22 a tract of 106 acres was sold in the name of A. N. Cone?
A. It was, sir.

A. This is a copy of the advertisement of all the property that was sold at that sale, at that time.

The Court: You sold a tract listed in the name of A. N. Cone?

A. Yes, sir, listed as 106 acres, for 1940 taxes.

Q. By Mr. Unger: And you had that piece of paper with you at the sale?
A. Yes, sir.
Q. Who purchased that?
A. On top of the paper I have a pencil notation of anything bid in HAJ or J then would be to the West Virginia Pulp & Paper Company, and anything AC would go to Ashley Corporation. Mr. Jenkins of the firm of Walker, Walker and Jenkins bid in a lot of property at a lot of sales and I made this notation. I have talked with Howard and he said whenever he bid in for the West Virginia Pulp and Paper Company I would use the HAJ or J, or if he bid in for the Ashley Corporation I would put in AC on top. In selling some of this the space was so limited I would have to abbreviate in order to get it in and this property was in the name of A. N. Cone, it was sold and bid in by Mr. Jenkins, with a "J" by it, which my record shows was the West Virginia Pulp & Paper Company. That is my records, my sale book.

Q. Did you make this record in your office from this?

A. Yes, sir.

Q. Was that property redeemed from the sale?

A. Yes, sir, it was redeemed on the 28th of December, 1942 when it was sold February 2, 1942.

Q. It was redeemed when?

A. December 28, 1942.

Q. What happens when property is redeemed, do you make any record?

A. Yes, sir, when it is redeemed the records goes on the sales books and that money is refunded to the purchaser.

Q. Did you refund money in this instance?

A. Yes, sir, I refunded money to West Virginia Pulp & Paper Company in the form of a check.

[fol. 161] Q. Have you that check with you?

A. Yes, sir, and the check is marked "for property of A. N. Cone, redeemed."

EXHIBIT: This check is introduced in evidence and marked Exhibit No. P-E, dated January 4, 1943, payable to West Virginia Pulp & Paper Company in the sum of $23.20, entitled "Property A. N. Cone redeemed" signed H. H. Jessen, endorsed on the back "For deposit only West Virginia Pulp And Paper Co., Charleston Account."

Portion of Cross Examination of H. H. JESSEN:

By Mr. Waring:

Q. You would have made a check out according to your books?

A. Yes, sir.

Q. So that if your book showed West Virginia Pulp & Paper Company bought it you would naturally repay them when it was redeemed?

A. Yes, sir.

Portion of Direct Examination of WESLEY M. CONE:

By Mr. Waring:

Q. Did you at any later date own any property, yourself, near there?

A. Yes, sir, adjoining this property in dispute.

Q. In which direction?

A. East from this property.

Q. Just east of this disputed property you owned that yourself?

A. Yes, sir, I got it from father.

Q. You got it from John Cone?

A. Yes, sir.

Q. Do you know where he got it?

A. I don't remember, I can't remember the name so far back, and so old I can't remember it.

Portion of Cross Examination of WESLEY M. CONE:

By Mr. Mozingo:

Q. When you got to the Canal, the dividing line, you said "Waring on that side", and "Cones on this side"?

A. Absolutely.

Portion of Cross Examination of JOHN HARVEY CONE:

By Mr. Mozingo:

Q. The canal was the dividing line between the Cone's property and the Waring and Perry tract up above?

A. Yes, sir.

• • • •

[fol. 162] Portion of Recross Examination of JOHN HARVEY CONE:

By Mr. Mozingo:

Q. So, the lands of Miles Cone and W. M. Cone and your grandfather, they joined together, didn't they?

A. Yes.

Q. The lands of your grandfather and W. M. Cone joined together?

A. W. Miles Cone and W. M. Cones joins together and W. M. Cone joined John Cone's land.

Portion of Cross Examination of HILL B. BEACH:

By Mr. Unger:

Q. Do you know the Waring property?

A. Originally the Waring but it is Perry.

Q. It was originally Waring or Perry?

A. Wasn't it bought from Waring, I know it was the Perry Property.

Q. You do know there is a Waring tract, is that right?

A. Waring?

Q. Do you know how many acres are in that Waring tract?

A. No, sir.

Q. There has been previously introduced here a Deed from Mary Joseph Waring to J. Lamb Perry, is that the Perry you are talking about?

A. This is Lamb Perry property, isn't it?

Q. The piece of land abutting, described here (reading)

> "All that Plantation or tract of land situate, lying and being in the Parish of St. Pauls in the District of Colleton (now Dorchester County) and State aforesaid called the Hope Plantation Containing Five hundred Acres more or less Butting and Bounding to the North on lands of James T. Lamb (now Perry) East and South on lands of Estate of Jos. Ioor Waring and West on lands of the estate of Benj. Perry (now Perry)" 500 acres, more or less.

This Plat here shows how many acres in the Waring tract, come down here (before Jury box) can you read?

A. I never was interested in the amount of acres in each tract, I never studied that at all. My business

Q. (Interrupting) That says "Waring"?

A. Yes, sir.

Q. 868 acres, there, doesn't it?

A. Yes, sir.

Q. Do you know where that tract of land is?

A. That is Hope Plantation.

[fol. 163] Q. The Deed said 500 acres, this Plat shows 868 acres. All right, now, Hill, since 1926 you have been working for West Virginia Pulp & Paper Company, what was the extent of your district how far did you go?

A. From the Edisto River to the Ashley River from the Coast Line Railroad up through this property as far as it extended.

Q. From the Edisto River to the Ashley River and from the Atlantic Coast Line on the South to the extent of the property on this plat?

A. Yes, sir.

Q. About how many acres to that, all in there?

A. I couldn't estimate it, I never asked the exact acreage.

Q. One thousand?

A. A good many thousand.
Q. Ten thousand acres?
A. A good many thousand.
Q. Would it be 20 thousand acres?
A. It might be, I imagine so.
Q. 30 thousand acres?
A. I never asked the exact acres the company owned.
Q. I know you don't—you went over all this land, you had all this land to cover, how much land did you cover?
A. I covered all I could.
Q. This jury doesn't know what your duties were, I want you to tell them how many acres of land you had to look over?
A. I couldn't do that.
Q. You don't know?
A. No, sir.
Q. It is, at least it is more than 20 thousand acres?
A. It might be, yes sir.
Q. As a matter of fact this Plat here adds up to almost 10,000 acres, this plat right here?
A. I never noticed the acreage before.
Q. You never have seen that plat before you were here?
A. I saw some similar to it.
Q. Have you ever studied it to see?
A. The boundary lines are all I ever studied to amount to anything.

Portion of Cross Examination of Howell Bivens:

By Mr. Mozingo:

Q. Mr. Bivens, what year did you say you went to work for the West Virginia Pulp & Paper Co.?
A. In 1925.
Q. Your position with the company, what was it?
A. Caretaker.
[fol. 164] Q. And was all of this property in your charge?
A. I looked over it, yes sir, kept fires off and trespassers.
Q. Within your charge you had a great many thousand acres to look over?
A. Yes, sir, several thousand.
Q. How many times do you guess you were ever down there where that fire line was cut?

A. I don't reckon I have been there but two or three times.

Q. It is no reflection on you, you had a large acreage to cover, it was impossible for you to go, to cover 106 acres, it is a small proportion of what they own?

A. Yes, sir.

Q. The whole time you were with the company you say you only were there two or three times?

A. That is right.

• • •

Q. And how many years were you caretaker?

A. From 1925 to 1943.

Q. That is a period of 18 years so in 18 years you visited the property about three times and on those occasions you never ran into Mr. Cone, in 18 years on three visits on the 106 acres?

A. I said three visits.

Q. (Interrupting) In all fairness it would be very unusual for you to go down there some day and see Mr. Cone on 106 acres in the acreage you had under your control. I doubt if you ever ran into other people than the people who were supposed to meet you there?

A. I ran into a few.

• • •

Portion of Cross Examination of TOM PEEPLES:

By Mr. Mozingo:

Q. Mr. Peeples, the gentleman that stood up back there have you seen him on that property much?

A. Not on that disputed property.

Q. You have seen him on the other property?

A. No, sir.

Q. But there is no question about him owning that property?

A. He owns it, so I understand.

Q. You have never seen him down there, you never saw this Mr. Cone on that disputed property?

A. I have been riding that disputed property.

Q. You have never seen either one on that property? [fol. 165] A. No, sir.

Q. One of the other witnesses testified the canal there was the dividing line between one Mr. Cone's property and West Virginia Pulp & Paper Company.

Objection by Mr. Waring: I object, he is trying to put words in this witnesses mouth.

The Court: Ask him.

Q. The canal is the dividing line between which Mr. Cone's property and West Virginia Pulp & Paper Co.?

A. How is that?

Q. There is a canal down there?

A. Yes, sir.

Q. And it is the dividing line between West Virginia Pulp & Paper Company and one of the Cones, is it not?

A. It may be the dividing line between them and one of the Cones, maybe.

Q. Which Mr. Cone is it, if you know. If you don't know it is all right.

A. I don't believe I know.

Q. You know it is a dividing line?

A. That canal don't run all the way back being a dividing line, no, sir.

Q. It is a dividing line between one of the Cones and West Virginia Pulp & Paper Co., yes or no?

A. Yes, I believe it is of the Mr. Cone back yonder, yes.

* * *

Portion of Direct Examination of RUSSELL E. HAYNES:

By Mr. Waring:

Q. Mr. Haynes, by whom are you employed?

A. West Virginia Pulp & Paper Co.

Q. What is your position with them?

A. Manager of southern woodlands.

Q. As such do you have charge of all the woodlands in this area?

A. Yes, sir.

Q. And does that include the Perry-Hughes properties?

A. Oh, yes.

Q. You have charge, too; generally of the records regarding these properties?

A. Yes, I do.

Q. As to the payment of taxes?

A. Yes, sir.

Q. And the records pertaining to the sale of timber for them?

A. I have access to those records, yes.

Q. They are under your charge?

A. Yes, they are under my charge, more or less.

[fol. 166] Q. You may not keep them all but they are under your charge?

A. That is right.

Q. Mr. Haynes, I hand you this paper, would you identify that, (handing witness a paper)?

A. That is a Tax Receipt No. 988.

(Mr. Waring shows receipt to attorney for plaintiff, who states there is no objection.)

EXHIBIT: Defendant offers in evidence two tax receipts for Dorchester County, Nos. 988 and 187, dated December 19, 1925, on 1,121 acres and 6,010 acres, respectively, each marked as Exhibit No. D-19.

The Court: Why not let him identify them all at one time and put them in as one pack, Exhibit No. (so and so) with a, b, c, etc. I suppose they are consecutive years?

Mr. Waring: No, sir.

Q. What is that year, Mr. Haynes? (referring to the two offered in evidence)

A. 1925, two tax receipts for 1925.

Q. (Handing witness other papers)

Q. Tax Receipts for 1940, school district 13 and 22.

The Court: Do these all cover the same property?

A. They cover this and adjoining properties of the Perry-Hughes.

The Court: The 1925 Tax receipts are put in as a numbered Ex. D-19.

Q. We have tax receipts for 1940, and these are for what year.

A. (Looking) 1941.

Q. And these are 1942, and these are 1943, and these are for 1944.

A. (Looking) Yes.

The Court: Do you gentlemen want to see them (speaking to attorneys for plaintiff.)

Mr. Waring: I would like to introduce them and then I want Mr. Haynes to read from the receipts and identify them.

EXHIBITS: Three tax receipts, Dorchester County, paid by the West Virginia Pulp & Paper Co., Nos. 5198, for

2000 acres; No. 9898 for 5106 acres, 2 bldgs; No. 5199 for 257 acres, paid Dec. 30, 1940, in School Districts Nos. 13, 22, and 13, respectively, marked in evidence as Exhibit No. D-20, each.

[fol. 167] Also, Three tax receipts, Dorchester County, paid by the West Virginia Pulp & Paper Co., Nos. 5261, 2000 acres, Sch. Dist. 13; No. 5262, 257 acres, Sch. Dist. 13; and No. 9915, 5106 acres, 2 bldgs., Sch. Dist. 22, each marked in evidence as Exhibit No. D-21, paid Dec. 22, 1941.

Also, Tax Receipts, 1942 taxes, Dorchester County, paid by West Virginia Pulp & Paper Co. in Sch. Dist. 13, (2) receipts Nos. 5442 and 5443; and (1) receipt, No. 10423, in Sch. Dist. 22, each of the three receipts marked in evidence as Exhibit No. D-22.

Also, Three tax receipts, 1943 taxes, Dorchester County, paid by West Va. Pulp & Paper Co., Nos. 5537, 5538, and 10821, each of the three receipts marked in evidence as Exhibit No. D-23.

Also, Three tax receipts, 1944 taxes, Dorchester County, paid by West Va. Pulp & Paper Co., Nos. 5547, 5546, and 10911, the two former being in School Dist. 13, and the latter in Sc. Dist. 22, each of the receipts marked in evidence as Exhibit No. D-24.

Q. Mr. Haynes, what exhibit is that, sir?

A. Exhibit D-19.

Q. Will you state what that is?

A. Well, the 1121 acres; there, that is a tax receipt No. 988 for 1121 acres.

Q. In what School District?

A. I don't think it was noted back there on that. That is a 1925 return and the District, I am not familiar with that.

Q. In what County?

A. Dorchester County, School District 11, for 1121 acres.

Q. And that shows the tax was paid for that year?

A. On the Waring and the Cadden properties.

Q. How do you know that?

A. By the acreage, the map acreage.

Q. Why do you say that, that that acreage corresponds?

A. Well, the two of them combined make up that acreage, 862 acres—for the Waring Tract it is 868 acres and 253 acres.

Q. I show you here, Mr. Haynes a Deed from H. Lamb Perry to West Va. Pulp & Paper Co., Defendants Exhibit D-2, dated April 5, 1924, and ask you to identify from that [fol. 168] acreage or read from that acreage, as given?

A. You want me to read just the acreage?

Q. Yes.

A. (reading) 253 acres Caddan, and all that certain part, Waring tract 868 acres.

Q. The two added together give you how many acres?

A. 1121 acres.

Q. Now, is there another receipt attached to that?

A. Yes, sir, for Dorchester County, No. 987, for 1925, 6010 acres.

Q. What does that represent?

A. That represents the Perry lands.

Q. Known generally by the company as what?

A. J. Lamb Perry.

Q. And—

A. And Hughes.

Q. And those are 6010?

A. 6010 acres, yes, sir.

Q. I hand you tax receipts, please identify them, they are Defendant's Exhibit D-20.

A. Tax receipt for the year 1940, Dorchester County, No. 5198 for 6000 acres in School District 13.

Q. How many acres?

A. 6000 acres, I am wrong, 2000 acres, value of $6000.

Q. 2000 acres in the School District No. what?

A. No. 13.

Q. Have you another receipt there for Dorchester County?

A. Yes, sir, another tax receipt for 1940, Dorchester County No. 5199, School District 13, for 257 acres, and the next receipt is for 1940, Dorchester County, No. 9898, Sch. District 22, 5106 acres.

Q. Now, can you tell from your records what properties those are for which the tax was paid?

A. Yes, sir.

Q. Could you explain how and what properties they are?

A. It covers the Waring, the Ann Waring tract, 257 acres and 5106, and the 2000 acres are Waring, J. Lamb Perry and Hughes tract.

Q. Do they include the property in dispute?

A. Yes, sir, they include the property in dispute.

Q. I hand you Defendant's Ex. D-21, would you go through and explain that in the same way?

A. This is for the year 1941, Tax Receipt, Dorchester County, No. 5261, for 2000 acres in School District 13; [fol. 169] tax receipt No. 5262, 1941, Dorchester County for 257 acres in School District 13, and tax receipt in the year 1941, Dorchester County, No. 9915, 5106 acres in the school district 22, and that covers the same land mentioned in the 1940 taxes.

Q. Now, Mr. Haynes, I will ask you to run rapidly thru these and in the same way tell me what they are, Exhibits D-22, D-23, and D-24, and I ask you what they are and state very briefly what they represent?

A. They are tax receipt for 1942, Dorchester County, No. 5442, 2000 acres in school district 12; tax receipt for 1942, Dorchester County, No. 5443, for 257 acres, in School Dist. 13; Tax receipt for 1942, Dorchester County, No. 10423, covering 5106 acres, in school district 22, that covers the same lands mentioned in the 1940 and 1941 taxes.

This is a tax receipt for 1943, Dorchester County, No. 5537, covering 2000 acres; tax receipt for 1943, No. 5538, covering 257 acres, those are both in School District 13; and tax receipt for 1943, Dorchester County, No. 1082; covering 5106 acres in School District 22. that again covers the same land mentioned in the previous years.

1944 tax receipt No. 5547, covering 257 acres in school district 13; tax receipt for 1944, Dorchester County, covering 2000 acres (No. 5546), in School District 13; and tax receipt for 1944, Dorchester County, No. 10911, covering 5106 acres in School District 22, that covers the same property mentioned before in the previous years.

* * *

The Court: Let Mr. Haynes remove the sheets that pertain to this property and put them in evidence.

Exhibit: One sheet, showing return for School District 13, is offered and marked into evidence as Exhibit No. D-25.

Also, Sheet for School District 22 is offered and marked into evidence as Exhibit No. D-26.

Q. Mr. Haynes, I hand you Ex. D-25, will you state what you find on that, what is that?

A. This is a return for taxes for the fiscal year, commencing January 1, 1938 for the School District 13, of Dorchester County, by West Va. Pulp & Paper Co., and [fol. 170] contains among other tracts the Perry-Hughes, a portion of it, 2000 acres, the Ann Evans Waring tract, 256.60 acres.

Q. That is all of the lands in that school district which the company refers to as the Perry-Hughes properties?

A. Yes, sir.

Q. I ask you to identify that, Defs. Ex. D-26, (handing witness exhibit)?

A. That is the return for taxes for the Fiscal Year commencing January 1, 1938 for the County of Dorchester, School District 22, return made by West Va. Pulp & Paper Company covering among other lands 5106 acres, known as a part of the Perry-Hughes tract.

Q. Now, Mr. Haynes, you have 2000 acres and 256 acres in No. 13?

A. 257 acres in 13.

Q. And 5106 acres in 22, which combined you identify as containing all of the lands in the Perry-Hughes tract. How can you reconcile that?

A. By the map, by the survey of that boundary.

* * *

Q. Do you have any tax receipts between the years 1925 and 1940?

A. I have them here, there are a good many.

Q. Now, without painfully going through them all, can you indicate whether similar payments were made on this property?

Objection by Mr. Unger: I object, make it more specific, what do you mean by "similar payments"?

The Court: If you must prove the taxes for each year, if you think it is necessary, go ahead and do it.

A. They are not sorted, but we can take them out.

Q. Did you pay the taxes on this particular property for 1926, I will ask you that?

Mr. Waring: I don't know, I think I will just

The Court: I don't think so, you may introduce it if you wish to.

Mr. Unger: We can't admit he has tax receipts in there for a number of years.

The Court: There is no criticism at all, if they want to put them in they can tabulate them.

Mr. Waring: I withdraw the question.

[fol. 171] Portion of Cross Examination of RUSSELL E. HAYNES:

By Mr. Unger:

* * *

Q. The Court: The direct examination is finished?

Mr. Waring: Yes, sir.

Q. Mr. Haynes, do you actually know where this 106 acres is?

A. I do not.

Q. You never have been over it?

A. I never have been on the property. I know the general location.

Q. You know, according to the evidence you introduced it is in school district 22, Burns Township?

A. Yes.

Q. Do you know whether or not that was formerly School District 11?

A. It was my understanding that School Districts changed back in 1925 or 1926, what school district it was originally, I wouldn't know.

Q. In 1925 you returned for taxes 1121 acres and 6010 acres in School District 22, that includes the land in question?

A. That is my understanding.

Q. In 1926 did you make a return?

A. I am sure there was a return made, of course, you understand, I didn't make the returns.

Q. You have no records in the office of that return in 1926?

A. I am satisfied there were taxes paid that year.

Q. May I have it?

A. The Tax Receipt?

Q. The Tax Return for 1926 for 1121 acres, in Burns School District 11, according to your receipt?

A. (Looking among receipts) Here are the receipts covering various tracts in School District 11.

Q. In 1926?

A. In 1926, yes, sir.

Q. Do you have one for 1121 acres?

A. It is a return for J. Lamb Perry and Blackburn Hughes, 7131 acres.

Q. Let me see the receipt, please sir.

A. Here it is, that takes a group of acres that is 18,400 acres.

Q. What School District is this in?

A. That is Township 11.

Q. That is Township 11, where is that on this receipt?

A. This is a part of the school—the list shows the grouping of that acreage.

Q. Do you see any School District 11, on that receipt?

[fol. 172] A. There is an 11 down there in the lefthand corner.

Q. It is your position in 1926 that you return it as how much acreage?

A. 7131.

Q. 18,400 acres?

A. That is right, it included the Blackburn Hughes and Perry tracts, which was 7131 acres.

Q. So that you lump it altogether in 1926 and had 18,400 acres in this one school district?

A. That is right.

Q. All right, how about 1927, have you a receipt in 1927?

A. Yes, sir, here is one for 1927.

Q. What school district have you got that?

A. 11, it is listed the same way,

Q. What are these other receipts, in School District 11, how much land did you own in this school district?

A. The acreage could be added up, I couldn't say, offhand, but considerable acreage, there are three different receipts covering township 11.

Q. All right, and you don't know if it was included in this 18,400 acres?

A. Oh, yes, I do, it shows the receipt numbers here and the acreage given here, on the various tracts to make the 18,400.

Q. Identify the 18,400 on that list you have, 1927.

A. Perry and Hughes, 7131, that was part of the 18,400.

Q. Perry-Hughes listed 7131 acres, is included in this 18,400 acres?

A. Yes, sir.

Q. 1927, 7131 acres in Perry-Hughes?

A. That is right.

Q. Now, in 1928, what receipt have you got there that belongs to this?

A. Same acreage and same school district, 18,400 acres.

Q. Do you have anything to show what makes up that 18,400?

A. This same acreage that was shown in previous lists.

Q. You assume that?

A. I don't have the detailed list.

Q. You are assuming that that was part of the 18,400 acres?

A. Yes, sir.

Q. Any school district?

A. School District 11.

Q. Now, how about 1929?

A. (Looking) 1929.

Q. You have a receipt there?

A. Yes, sir. Covering 18,400 acres, School Dist. 11.

[fol. 173] Q. May I see it. What other school districts have you there in that pile?

A. Two more—three more school districts, No. 13, No. 14, No. 18, and No. 16.

Q. Now, will you please give me, this is 1929, give me the 1928 and 1927 again, please, sir.

A. You mean the tax receipts?

Q. Yes.

A. There is 1928 and 1927.

Q. How about 1930?

A. (Looking among tax receipts) 1930, School District 11, tax receipts covering 19,420.6 acres.

Q. You are assuming that is a part of this?

A. I am assuming that is a part of what?

Q. That this 106 acres is a part of this 19,420.6, you are assuming that?

A. Based on former returns.

Q. Based on the fact you had an itemized statement in your records before?

A. Yes, sir.

Q. All, right, 1931?

A. 1931, that is when the school district changed.

Q. Yes, sir, formerly 11, now 22.

A. I have two receipts here one in 13 and one in 22 covering acres.

Q. What acres do they cover, in School district 22?
A. 9420.6, we had detailed lists for them.
Q. You had them?
A. We had them for each year but I only have the one for 1940, here.
Q. 1931—9420 acres. How about 1932?
A. You just asked me for School District 22?
Q. Yes?
A. 9420 acres.
Q. Now, 1933? 1933 is how much?
A. 9420 acres.
Q. Now, 1934?
A. We have several School District 22 here.
Q. Tell me which piece of land this one was returned in?
A. Frankly, without that detailed list I wouldn't know.
Q. You have such a detailed list?
A. Oh, yes, it is in our office.
Q. You didn't bring it with you?
A. I did not.
Q. What about next year, 1935 is that in the same condition? Let's see those that are all in District 22, that is what you have in School district 22? Let's keep those separate. Now, in 1934 School District 22?
A. All of them in School District 22?
[fol. 174] Q. Yes.

The Court: You have quite wide latitude in cross examination, Mr. Unger—what is the purport of all these tax receipts?

Mr. Unger: These tax receipts are not paid by West Va. Pulp & Paper Company, your Honor.

The Court: They are not?

Mr. Unger: No, sir, these are Cooper River Timber Company.

The Court: Couldn't you just ask him a question as to how long the Cooper River Timber Company owned this property and when the property was transferred?

Mr. Unger: May i please the Court, there is no deed that the Cooper River Timber Company ever owned any of this property or any part of it .

Q. (Getting receipts for 1934 from the witness.) And now 1935, Mr. Haynes?
A. (Giving Mr. Unger the receipts for 1935.)

Q. Is that all School District 22?

A. Yes, sir.

Q. These are all Cooper River Timber Company?

A. Yes, sir.

Q. No, there is one West Va. Pulp & Paper Company, what is that?

A. That is a lease, that is a timber lease.

Q. The West Va. Pulp & Paper Company did return one thing in 1935?

A. Must have, there it is.

Q. All these others are to the Cooper River Timber Company? No, there is another, there is two of them?

A. That is a timber lease.

Q. Two timber leases, and all the rest of these are to the Cooper River Timber Company. Now, 1936? You have 1936, all the returns in School District 22, are you able to identify any of these receipts as the taxes paid on this 106 acres? A. There is 5106 acres, which we returned.

Q. Hand me that, one receipt that is the taxes on this 106 acres?

A. Yes, sir.

Q. That is in the name of West Va. Pulp & Paper Co?

A. Yes, sir.

Q. It is, in 1936. This is your 1925 return?

A. Yes, sir.

Q. That is in the name of West Va. Pulp & Paper Co?

A. Yes, sir.

[fol. 175] Q. And so it isn't until again in 1936 the taxes began to be paid in the name of West Va. Pulp & Paper Co.?

A. No, from the tax receipts, that is true.

Portion of Re-direct Examination of Mr. Russell E. Haynes:

The Court: Let me ask you something, why did these lands you refer to in the tax receipts—were they owned by the Cooper River Timber Company or the West Va. Pulp & Paper Co?

A. That would be a hard one for me to understand.

The Court: Who made the tax returns?

A. The man who made the tax returns?

The Court: No, not the man who wrote down the return but who supervised.

A. Mr. Cuthbert.

The Court: Do you know why West Va. lands were returned in the name of Cooper River Timber Company or vice versa?

A. I think that was the name of the corporation at that time.

Portion of Re-cross Examination of Mr. Russell E. Haynes:

By Mr. Unger:

Q. As a matter of fact the deed to this property was taken in West Va. Pulp & Paper Company, was it not? West Va. Pulp & Paper Company was a corporation in 1925?

A. I couldn't say that.

Q. Your tax record in 1925 was in that name it shows it was West Va. Pulp & Paper Company, does it not?

A. Yes, sir.

Ruling on Auditor's Certificate

Mr. Unger: We introduced in the case in chief, and you reserved your ruling, on the certificate of the auditor of Dorchester County on the true and correct copy of records in regard to Burns School District #22 of tracts of West Va. Pulp & Paper Company, you reserved your opinion on the ground that there was no testimony where the land lies. At this state we would ask for your ruling on that certificate.

[fol. 176] The Court: Let me see it. (A copy is handed the Court)

Mr. Unger: There was no proof at that time that the land was in School District 11 and 22 and we think the thing has been cleared up by the testimony of Mr. Haynes and these receipts simply show it is true the West Va. Pulp & Paper C mpany did not return the land for taxes.

Mr. Waring: It doesn't show any such thing. This shows my friend is reading a lot into the record.

The Court: I will let it in, it shows the West Virginia Pulp & Paper Co., did return in 1925 and no return to 1930 in School District 11, no return except in 1925;

then in 1931 school District 11 became school district 22, and there was no return and that goes through 1936. It shows the same thing that has been testified to by your witness.

Mr. Waring: I am objecting right here, sir, all this business about Waring Tract, which my friend is trying to read into this record, has absolutely nothing to do with this. It is a wholly different tract and has nothing to do with the case at issue.

The Court: Is this the complete return?

Mr. Unger: This is his entry, an entry in 1937 and 1936, we have a complete return, a complete listing in that School District, because we were unable to identify what of the tracts it came out of, in 1938 to 1943 it shows one of the tracts.

The Court: I will admit it in evidence and tell the jury this part, from 1938 to 1943 is just a portion that is picked out from the auditor's reports, there may be hundreds or thousands of other acres returned. We don't know, you may take it with that, in other words, it is not a full record, it is a record of part of the return.

Mr. Unger, you didn't attempt to get a certificate of the entire return?

Mr. Unger: Your Honor, at the pre-trial, this Waring land came up and I didn't have the information to know what part they claimed and we secured information a Waring Tract was returned.

The Court: That is all the testimony you have?

Mr. Unger: Yes, sir.

[fol. 177] CERTIFICATE

STATE OF SOUTH CAROLINA
County of Dorchester

St. George, S. C., 14 May 1945

I, the undersigned H. J. Patrick, duly elected and qualified Auditor for Dorchester County, South Carolina, hereby certify the following to be a true and correct copy of records under my supervision in the County Court House of Dorchester County:

1. 1944 Burns Sch. Dist. #22 Various tracts inter alia of W. Va. Pulp & Pap. Co. Waring Tract 508 acres Pd.

1943 " " " " " " "
1942 " " " " " " "
1941 " " " " " " "
1940 " " " " " " "
1939 " " " " " " "
1938 " " " " " " "

1937 Burns School District #22
West Virginia Pulp & Paper Co.
Various Tracts as follows: 144 acres
636 "
43 "
143 "
5106 "
44 "
268 "
343 "
57 "
162 "
124 "
240 "

Pd.

[fol. 178]

1936 Burns School District #22
West Virginia Pulp & Paper Co.
Various tracts as follows: 144 acres
636 "
42 97/100 acres
142 8/10 "
5106 "
44 2/10 "
268 40/100 "
343 28/100 "
57 1/2 "
162 "
124 "

1935 Personal property $2,520.00. No real estate.

1934	Burns	School	District	#22	No	return
1933	"	"	"	"	"	"
1932	"	"	"	"	"	"

West Virginia Pulp & Paper Co.

1931	Burns	Sch.	Dist.	Formerly #11 now #22	no	ret.
1930	Burns	School	District	#11	no	return
1929	"	"	"	"	"	"
1928	"	"	"	"	"	"
1927	"	"	"	"	"	"
1926	"	"	"	"	"	"
1925	"	"	"	"	1121 acres and 6010 acres	

2. J. Lamb Perry to West Virginia Pulp & Paper Company

1924	Burns School District #11	900 acres
		250 acres
		5 "

Certified under seal in my office this 14th day of May 1945.

(Signed by) J. H. PATRICK (L.S.)
J. H. PATRICK, Auditor
Dorchester County

[fol. 179] PLAINTIFF'S EXHIBIT

P-E

Check of H. H. Jessen, Sheriff of Dorchester County to West Virginia Pulp and Paper Company, redeeming land of A. N. Cone from tax sale.

Front Side

Reverse Side

1382A

OFFICE OF SHERIFF
DORCHESTER COUNTY
ST. GEORGE, S. C.

CHARLESTON, S.C. January 4th 1943 No. 810

KING STREET OFFICE

CAROLINA SAVINGS BANK

KING STREET

PAY TO THE ORDER OF West Virginia Pulp & Paper Co $23.20

Twenty-three 20/100 DOLLARS

COLLECTIBLE AT PAR THROUGH ANY FEDERAL RESERVE BANK

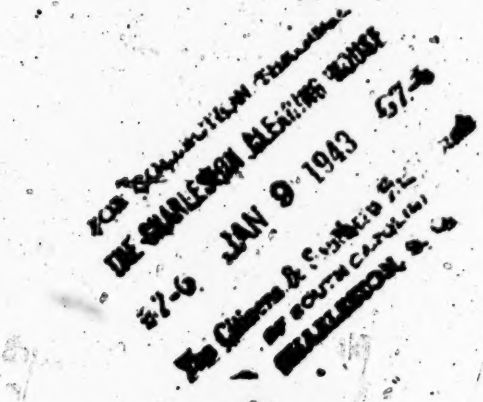
Property -
A. H. Cone - Redeemer

A. H. Geer SHERIFF
DORCHESTER COUNTY, S. C.

A-179

1328

FOR DEPOSIT ONLY
WEST VIRGINIA PULP
AND PAPER CO.
CHARLESTON ACCOUNT



IN EVIDENCE
Exhibit No. P-6
ERNEST L. ALLEN
U.D.C.D.S., E.D.S.C.

B-179

[fol. 180] AFFIDAVIT IN REPLY TO NOTICE OF MOTION OF DEFENDANT FOR NEW TRIAL ON THE GROUNDS OF AFTER DISCOVERED EVIDENCE

Personally appeared before me H. Wayne Unger, who upon being duly sworn says that he is one of the Attorneys for the Plaintiff in the above entitled case; that he has been served Notice of Motion for a New Trial on the Grounds of After Discovered Evidence, annexed to which is affidavit of Charles W. Waring, one of the Attorneys for the Defendant, in which he alleges that the Defendant was taken by surprise in that they had no knowledge that the Plaintiff claimed title to the tract of land in dispute through Miles Cone under deed from A. Miles Cone dated 19 September 1888, recorded 6 October 1888 in Clerk of Court of Colleton County in book 7 at page 282, and that there was no evidence at the pretrial conference or prior to the trial between the attorneys that the Plaintiff claimed through said deed; that the deponent in accordance with the agreement with counsel at the pretrial conference on May 17, 1945, prior to trial, mailed to the said Charles W. Waring certified copies of the papers which he desired admitted in the chain of title of the respective parties without formal proof including the deed from A. Miles Cone to Miles Cone, copy of which letter deponent annexes hereto and makes a part hereof; That prior to May 17, 1945 the deponent met with the said Charles W. Waring in the Office of Clerk of Court of Dorchester County at St. George, S. C., where they were both preparing for trial, and *thereat* verbally discussed with [fol. 181] him the admission of these particular deeds and brought to his attention that the only deeds required by the Plaintiff for his chain of title would be the said deed from A. Miles Cone to Miles Cone and from Caroline F. Cone to the Plaintiff, Andrew M. Cone; that subsequently on May 18, 1945 the said Charles W. Waring, Defendant's Counsel, mailed to the deponent Defendant's exhibits which included the said deed from A. Miles Cone to Miles Cone, the letter transmitting said certificates being annexed to this affidavit; deponent further says that the said Charles W. Waring and the Defendant through the above exchange of deeds had adequate notice of the claims of the Plaintiff through the deed of the said A. Miles Cone to Miles Cone, and on page 91 of the transcript of

the record in the above entitled case the Defendant by Charles W. Waring introduced into the formal evidence of the case a certified copy of the deed from A. Miles Cone to Miles Cone over the objections of the deponent who pointed out the said deed was already in the record as Plaintiff's exhibit; that on page 5 of the said transcript of the testimony in the case the said Charles W. Waring objected to the introduction of the deed by the Plaintiff from A. Miles Cone to Miles Cone on the grounds that it bore no relationship to the land in dispute, showing that he was fully aware of the Plaintiff's position that it was a part of this land; that the transcript of testimony throughout the case shows that the Defendant was prepared to dispute the Plaintiff's claim of title through this deed from A. Miles Cone to Miles Cone and on page 97 of the transcript the Defendant on direct examination of its witness Wesley M. Cone secured testimony from Mr. Wesley M. Cone that he was a brother of Miles Cone and knows his land and that the disputed property was not a part of it; Again on page 101 of the transcript the Defendant on direct examination of its witness John Harvey Cone, the brother of the said Wesley M. Cone and a nephew of Miles Cone, testified that the Miles Cone property referred to in the Defendant's as well as the Plaintiff's exhibit did not include the disputed property and that the Miles Cone property therein referred to was always to the West of the disputed property; Again [fol. 182] on page 124 of the transcript of testimony on direct examination the Defendant through its witness Hill Beach testified that the Miles Cone property was always to the west of the disputed land; So that the deponent sayeth that the Defendant was not surprised by claim of the Plaintiff through said deed from A. Miles Cone to Miles Cone but on the contrary was prepared to offer testimony, and did offer testimony that it was not a part of said tract; that deponent further sayeth that prior to May 17, 1945 at which time the deponent met the said Charles W. Waring at the Office of the Clerk of Court of Dorchester County at St. George, S. C., at which time the deponent was securing certificates from the Auditor of Dorchester County, that the said Charles W. Waring was also examining the records of the Auditor of Dorchester County and knew from the original pre-trial conference, at which time deed from Caroline F. Cone to A. N. Cone

was introduced, that the Plaintiff was claiming through said Caroline F. Cone the land in dispute and that the said Charles W. Waring had ample opportunity to examine the Auditor's records relative to the said Caroline F. Cone, through which Plaintiff claimed, at that time and various times prior to trial; at the time of said meeting, prior to trial said Charles W. Waring also examined the public records of Dorchester County and that the deponent and the said Charles W. Waring mutually exchanged copies of deeds in the chain of title including the said deed from A. Miles Cone to Miles Cone and that the said Charles W. Waring had ample opportunity to examine the records there at the time and prior thereto before trial to determine the disposition of the property of the said Miles Cone, including the deeds and instruments annexed to his Notice; the deponent further sayeth that Owen Cone, present owner of the estate of Miles Cone under the deeds annexed to the Defendant's Notice, testified at the trial that he claims no interest in the 106 acres of land (page 53 of transcript) that the said Miles Cone cut off from his estate, a piece of land to the east, being the disputed property, for his mother Caroline F. [fol. 183] Cone (page 57 of the transcript) and to his knowledge his mother owned no other land in that School District,

(Signed by H. Wayne Unger)
H. Wayne Unger

Sworn to before me this 30 day of July 1945. Florence V. Gensheimer, Notary Public for South Carolina. My commission expires at the pleasure of the Governor. (Seal)

May 17, 1945

Waring & Brockinton
35 Broad Street
Charleston, South Carolina

Mr. Charles W. Waring

Gentlemen:

Re: *A. N. Cone* v. *West Virginia Pulp & Paper Co.*
I enclose herewith carbon copies of certified deed from M. J. Waring to J. Lamb Perry recorded in Dorchester County deed book 2 at page 213; deed from A. Miles Cone

to Miles Cone recorded in Dorchester County. Colleton Transfer deed book 6 at page 138; and deed from Susan M. Perry to Miles Cone recorded in Dorchester County Colleton Transfer book 6 at page 137. These original certificates will be part of the Plaintiff's exhibits.

This will also confirm our conversation at St. George last Monday, that you will produce Cutting Agreement between West Virginia Pulp & Paper Company and Mr. George Cooley of Carolina Logging Corporation for cutting the timber on the 106 acres in dispute, without formal notice.

We trust that you have been able to secure the services of a reporter, but if by any chance you were unable to do so our Mrs. Florence Gensheimer states she is willing to try her hand at it although she has never reported any big [fol. 184] court cases. She has handled many Magistrate trials and inquests for me in an excellent manner.

Yours very truly Jefferies, McLeod & Unger
(signed) H. Wayne Unger U/g enc.

WARING & BROCKINTON
35 Broad Street
Charleston-F, South Carolina

May 18, 1945

Messrs. Jefferies, McLeod & Unger, Attorneys at Law, Walterboro, S. C.,

Re: *A. N. Cone* v. *West Virginia Pulp and Paper Company*

Gentlemen:

We have just received a complete set of all Deeds which were to be certified for us in connection with the above matter. Accordingly, we are only now able to send you a complete set of carbon copies of all of the Deeds which we expect to present in evidence.

You will find enclosed copies of the following Deeds:

1. A. Miles Cone to Miles Cone (with plat) recorded Dorchester County, Transcription Book 6, Page 138.

2. Joseph I. Waring to John Cone (with plat) recorded Dorchester County, Transcription Book 10, Page 103.

3. John Cone to Sarah Cone, recorded Dorchester County, Book 1, Page 480.

4. Sarah Cone to James Cone, recorded Dorchester County, Book 20, Page 78.

5. James Cone to Fred Goodwine, recorded Dorchester County, Book 32, Page 71.

6. Fred Goodwine to Bank of Dorchester, recorded Dorchester County, Book 49, Page 6.

7. Bank of Dorchester, to Cooper River Timber Company, recorded Dorchester County, Book 51, Page 387.

[fols. 185-186] 8. Cooper River Timber Company to West Virginia Pulp and Paper Company, recorded Dorchester County, Book 61, Page 588.

9. James Lamb Perry to West Virginia Pulp and Paper Company, recorded Dorchester County, Book 43, Page 586.

10. Mary Joseph Waring to J. Lamb Perry, recorded Dorchester County, Book 2, Page 213.

11. James Tupper, Master, to Mary S. Waring and Josephine M. Waring, recorded Dorchester County, Book 43, Page 509.

12. Elias B. Scott to Joseph Ioor Waring (with plat) recorded Dorchester County, Book 43, Page 592.

Arrangements have been made with Mrs. Wallace of Florence to report the case and I think that you will find her work entirely satisfactory. We have had her do similar work previously and were very much pleased with her report.

We will produce at the time of the trial without formal notice a copy of the Cutting Agreement entered into between West Virginia Pulp and Paper Company and Carolina Logging Company in September, 1941.

Very truly yours, Waring & Brockinton, By (signed) Charles W. Waring, CHW:g.

[fol. 187] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5442

WEST VIRGINIA PULP & PAPER COMPANY, a Corporation, Appellant,

VERSUS

A. N. CONE, Appellee

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston

MINUTE ENTRIES

October 20, 1945, the transcript of record is filed and the cause docketed.

Same day, order extending the time for filing the record and docketing the action is filed.

Same day, the original exhibits are certified up.

October 25, 1945, the appearance of H. Wayne Unger and James P. Mozingo is entered for the appellee.

October 26, 1945, the appearance of Christie Benet, D. A. Brockington and Charles W. Waring is entered for the appellant.

October 29, 1945, statement under section 3 of rule 10 is filed.

November 7, 1945, application of appellant for leave to file a bond for costs on appeal in the amount of Two Hundred and Fifty Dollars is filed.

ORDER GRANTING APPELLANT LEAVE TO FILE BOND FOR COSTS ON APPEAL—Filed and Entered November 7, 1945

On consideration of the Application of appellant, by its counsel,

Leave is hereby granted the appellant to file in the District Court of the United States for the Eastern District of South Carolina, at Charleston, a bond for costs on appeal in the amount of Two Hundred and Fifty Dollars in the above entitled case.

November 7, 1945.

Morris A. Soper, U. S. Circuit Judge.

[fol. 188] Same day, to-wit, November 7, 1945, certified copy of order granting leave to appellant to file bond

for costs on appeal is transmitted to the Clerk of the U. S. District Court at Charleston, S. C.

December 6, 1945, certified copy of order of District Court amending the transcript of record is filed.

Note: This appears at page 232a of the complete transcript of record and is, therefore, omitted here.

December 14, 1945, brief on behalf of the appellant is filed.

December 15, 1945, appendix to brief of appellant is filed.

December 31, 1945, brief and appendix on behalf of the appellee are filed.

Argument of Cause

January 10, 1946, (January term, 1946) cause came on to be heard before Soper and Dobie, Circuit Judges, and Gilliam, District Judge, and was argued by counsel and submitted.

[fol. 189] UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 5442.

WEST VIRGINIA PULP & PAPER COMPANY, a Corporation, Appellant,

VERSUS

A. N. CONE, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON. CIVIL ACTION.

(Argued January 10, 1946.

Decided February 7, 1946.)

Before SOPER and DOBIE, Circuit Judges, and GILLIAM, District Judge.

[fol. 190] Christie Benet and Charles W. Waring (D. A. Brockinton and J. B. S. Lyles on brief) for Appellant; and H. Wayne Unger and James P. Mozingo (Jefferies, McLeod & Unger, and W. J. McLeod, Jr., on brief) for Appellee.

OPINION—Filed February 7, 1946

DOBIE, Circuit Judge:

Andrew N. Cone, hereinafter referred to as plaintiff, brought an action in the Court of Common Pleas for Colleton County, South Carolina, against West Virginia Pulp and Paper Company, a Delaware corporation, hereinafter referred to as the Paper Company, or as defendant, claiming $25,000 damages for trespasses by the defendant in entering plaintiff's land and cutting and removing timber therefrom. The case was removed to the United States District Court for the Eastern District of South Carolina on the ground of diversity of citizenship and was tried with a jury at the May Term, 1945.

The plaintiff's amended complaint alleged that he was the owner of a tract of land situate in Dorchester County, South Carolina, consisting of 106.5 acres, which had been conveyed to him by his mother, Caroline F. Cone, in 1920, and that he had thereafter been in quiet, peaceable and exclusive possession of this tract of land for more than twenty years. He further alleged that the defendant, its agents and servants, had entered thereon in September, 1941, without the plaintiff's knowledge or consent, and had cut and removed a large quantity of timber. The defendant entered a general denial and, after two pre-trial conferences, the case came on for trial.

[fol. 191] The action was in the nature of the old common law action of trespass *quare clausum fregit*, which bases the plaintiff's right to recover upon the injury to his possession. Hence the defendant's general denial put plaintiff first to the proof of such possession, actual or constructive, as would maintain an action. The South Carolina authorities are clear that plaintiff might do this by proof either of actual physical possession, the *pedis possessio*, or by proof of a perfect legal title, from which constructive possession is presumed. *Beaufort Land & Investment Co.* v. *New River Lumber Co.*, 86 S. C. 358, 68

S. E. 637; *Haithcock* v. *Haithcock,* 123 S. C. 61, 115 S. E. 727, 734; Section 377, Code of South Carolina, 1942. Constructive possession may also be shown by other methods, as by physical occupancy of part of a tract under color of title, whereby constructive possession of the entire tract is said to be established; but we are here dealing with wild and unoccupied lands, and no actual physical occupancy of these lands was either claimed or proved by plaintiff.

At the trial plaintiff undertook first to prove his legal title. This he might do in any one of four ways: (1) by producing a grant from the State and connecting himself therewith by an unbroken chain of paper title; (2) by tracing his paper title back to a common source and proving the better title therefrom; (3) by showing that he, together with those under whom he claimed, had been in adverse possession continuously for twenty years, whereby a presumption of a grant would have arisen; or (4) by proving that he himself had been in adverse possession continuously for a period of ten years. *Thomas* v. *Dempsey,* 53 S. C. 216, 220, 31 S. E. 231, 233; *Haithcock* v. [fol. 192] *Haithcock,* 123 S. C. 61, 66, 115 S. E. 727, 729. Admittedly, he made no serious attempt to qualify under either of the first two of these methods, since he produced no paper title back of 1888 and was unable to connect up by admissible evidence the title back of his immediate grantor, his mother, who, it was stated, had acquired the property in 1917. In this connection it may be noted that plaintiff's deed from his mother, contrary to almost universal practice, makes no mention whatsoever of the source of his grantor's title.

It may be interjected here that harmful error unquestionably took place in the admission of, and failure to take from the jury, testimony with respect to the plaintiff's purported chain of title prior to the deed from his mother to him. All this testimony was admitted by the judge "subject to it being connected up with the present owners", yet when a motion to strike it for failure so to connect this testimony was made, the judge denied the motion, stating that this was a matter for the jury. The confusion made possible by this retention of inadmissible evidence as to the state of the plaintiff's title is best exemplified by the fact that the judge himself speaks of the

"lost deed" from plaintiff's father to his mother, although there is not a single scrap of testimony in the record that the deed was lost or in any other manner accounted for, nor was even its original existence ever testified to by anyone who had seen it.

Returning to the details of the plaintiff's proof, we find that his inability to establish proper paper title left him dependent upon proof of adverse possession, either for ten years in himself, or for twenty years in himself and those under whom he claims, if he was to establish title as a [fol. 193] basis for the present action. The extent of the adverse possession required as to unenclosed and unimproved lands is stated by the statute to be "where * * * it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant." Section 379, Code of South Carolina, 1942.

The quality of the plaintiff's proof as to any such possession left much to be desired. Accepting his own testimony at face value, he had hunted on it, though not every year, had cut and sawed some fallen trees for clapboard in 1923 or 1925 "and all through there", and would camp upon it for as much as a week at a time during hunting season. However, he had never posted it, claimed never to have seen either the fire line cut by the CCC in 1935 or the posted signs regularly maintained by the defendant, both of which were testified to by several witnesses, and finally summarized his actions in the following words: "After I moved away from there (in 1923) I didn't do nothing." Aside from this testimony, the only other evidence of his possession was that he paid taxes on the property and that his father, in his behalf, had given one other individual permission to hunt on the property.

Such sporadic acts do not satisfy the requirements to constitute adverse possession. Among the many decisions on this point, reference is made to only a few. From this Court, in another South Carolina case, we find the following statement in an opinion by Judge Woods in *Mullins Lumber Co.* v. *Williamson & Brown Land & Lumber Co.*, 255 F. 645, 647:

> "The land in dispute was wild swamp land, incapable of cultivation. The testimony relied on to establish adverse possession proved no continuous use or

acts of trespass, but only occasional cutting of [fol. 194] timber. This is not sufficient to establish the requisite continuity of possession. *Bailey* v. *Irby*, 2 Nott & McC. (S. C.) 343, 10 Am. Dec. 609; *Duren* v. *Sinclair*, 22 S. C. 361-366; *Love* v. *Turner*, 78 S. C. 513-519, 59 S. E. 529. * * *"

In the case of *Lewis* v. *Pope*, 86 S. C. 285, 68 S. E. 680, 683, the following statement was specifically approved:

"He cannot succeed in such claim (of adverse possession) by living on another tract and cultivating for a few years a small patch on the tract he claims, or by going on such tract and sometimes cutting wood or timber, and hauling it off for use on the tract on which he lives, but he must show that he has been doing that for 10 consecutive years."

From an exhaustive analysis of the authorities in *Weston* v. *Morgan*, 162 S. C. 177, 160 S. E. 436, at p. 445, the following summary may be quoted:

"A plaintiff claiming title by adverse possession must show the extent of his possession. *Cantey* v. *Platt*, 2 McCord, 260.

"The burden of the proof of adverse possession is on the one relying thereon. *Gourdine* v. *Fludd*, Harp. 232.

"Occasional and temporary use or occupation does not constitute adverse possession. *A. C. L. R. Co.* v. *Searson*, 137 S. C. 468, 135 S. E. 567.

* * * * * * *

"And to constitute adverse possession it must be open, notorious, exclusive, hostile, continuous, and unbroken for the whole period. *Hill* v. *Saunders*, 6 Rich. 62; *Ouzts* v. *McKnight*, 114 S. E. 303, 103 S. E. 561; *Clary* v. *Bonnett*, 114 S. C. 459, 103 S. E. 779; 1 R. C. L. 700-716.

"Successive possessions for less than the statutory period cannot be tacked, unless by descent cast. *King* [fol. 195] v. *Smith*, Rice, 10; *Porter* v. *Kennedy*, 1 McMul. 354; *Garrett* v. *Weinberg*, 48 S. C. 28, 26 S. E. 3.

"Occasional or temporary use or occupation is not sufficient. *Jackson* v. *Lewis*, Cheves, 259; *McCullough* v. *Wall*, 4 Rich. 68, 53 Am. Dec. 715."

And further, with reference to the necessity of establishing continuity of such adverse possession, the following statement is taken from *Cathcart* v. *Matthews*, 105 S. C. 329, 89 S. E. 1021, at page 1025:

> "It has been said that, if there be one element more distinctly material than another in conferring title by adverse possession, where all requisites are so, it is the existence of a continuous adverse possession. There must be such continuity of possession as will furnish a cause of action for every day during the whole period required to perfect title by adverse possession." 2 Corpus Juris, 82; *Porter* v. *Kennedy*, v *McMul.* 354; *Hill* v. *Saunders*, 6 Rich. 62; *Massey* v. *Duren*, 3 S. C. 34."

From all the foregoing, it seems obvious that the plaintiff here has failed to establish such possession, actual or constructive, as to establish his title to the property. Having failed to establish title, his action must fail unless his proof shows him to have been in possession at the time of the trespass.

It follows of necessity that the inadequacies of plaintiff's proof of prior possession become even more glaring if they are to be interpreted as proof of present possession. Especially is this so if this proof is considered in the light of the defendant's proof offered to establish its own actual possession, since its purchase of the property in 1924. In brief, this proof of the defendant showed the cutting of an extensive fire line by the CCC on behalf of the Paper Com- [fol. 196] pany; the regular maintenance and clearance of this line by Company agents, the regular posting of the property by the Paper Company, entry upon the property to guard against poachers and fire hazards at intervals of about once a week by an agent of the Company, and finally the entry (herein complained of) when the bulk of the timber on the property was cut. It is difficult to see that defendant could have done much more to assert its possession.

The following statement of the acts of ownership or possession required as to lands such as this tract is taken from *D. W. Alderman & Sons Co.* v. *McKnight*, 95 S. C. 245, 78 S. E. 982, 986:

> "On the question of adverse possession my concep-

tion of the law is that the law is not as strict or as jealous as to what constitutes acts of adverse possession with regard to open, wild, unfenced, and uncultivated lands, or lands that are not capable of cultivation, as it would be with regard to lands that are capable of cultivation, or which are situated in some time capable of having the highest acts of possession exercised with regard to them; but that acts of adverse possession, or acts of ownership, with regard to open, wild, unfenced lands, lands not capable of cultivation, are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property admits of without actual residence or occupancy."

The plaintiff makes much of the point that he paid taxes on the property, whereas such payment by the Paper Company was not clearly shown. The South Carolina law on this point has been expressed in the statement: "The payment of taxes is not evidence of title as is supposed in [fol. 197] popular myth, but the failure to pay is evidence that no claim was made." *Gadsden* v. *West Shore Investment Co.*, 99 S. C. 172, 82 S. E. 1052, 1053. But in applying this rule to the instant case, it must be remembered that the state of the proof was merely that payment by the Paper Company was not conclusively established for all years of ownership. Defendant did allege such payment by a subsidiary company, the Cooper River Timber Company, for the intervening years.

It is most unfortunate that the system of keeping the land records for taxation in this region was such that it is almost entirely impossible to determine with any measure of certainty just what parcel or parcels of land were covered by a particular tax payment. The inadequacies of this system also account for the otherwise curious fact that the State would accept, without inquiry, an unlimited number of duplicate payments of taxes by different parties on the same tract of land for the same year. In such a state of the records, it does not appear that material reliance by either party upon payment of taxes is really justifiable.

In the foregoing portions of this opinion we have set forth our views of the facts as they were presented at the trial, along with the related comments on the apposite law, as we see it. Before summarizing our conclusions, it must

be stated that the defendant took numerous exceptions to the introduction of certain evidence, to some of which reference has already been made, and moved for a directed verdict at the conclusion of the entire testimony. This motion was denied and the jury returned a verdict for the plaintiff, setting the damages at $15,000. The defendant moved for a new trial and later renewed this motion upon the basis of newly-discovered evidence. Following [fol. 198] judgment for plaintiff after the denial of these motions, the case was brought here on appeal.

On its appeal, the defendant argues that the judgment below should be reversed in consequence of the plaintiff's failure to establish either title or possession and the defendant's establishment of both title and possession, because of prejudicial error in the admission of testimony as to the plaintiff's back title, because of the denial of the motion for a new trial on the basis of after-discovered evidence, and also because of a contention not previously noted here, namely, that the trespass complained of was not committed by the defendant. Our views with respect to several of these grounds have already been indicated, at least in part.

Specifically, we have already indicated our opinion that prejudicial error occurred in the admission of evidence with reference to the plaintiff's alleged predecessor in title. This ground alone is sufficient to require a remand of the case for a new trial, so that it is unnecessary for us to consider whether the denial of defendant's motion for a new trial upon after-discovered evidence was error. The defendant's final contention, that since the actual cutting of the timber was done by another company, no liability was shown as to it, seems to us without merit. It is conceded that the other company entered under authority of a timber deed from the Paper Company, acted on its behalf, and was directly supervised in its actions by the Paper Company's agents. One may not escape civil responsibility for a trespass merely by hiring some one else to do the physical labor involved, under one's own immediate supervision. Accordingly, we reject this basis of the defendant's appeal.

This leaves only the question as to whether or [fol. 199] not the plaintiff has established sufficient possession, actual or constructive, to justify him in maintaining this action. Since the defendant has also undertaken to show its own actual possession, it is in order to consider

the legal status of two conflicting claims of possession at the same time. The following quotation from the old case of *Vance* v. *Beatty*, 4 Rich. 104, has recently been reaffirmed by the South Carolina Supreme Court in *Littleton* v. *Roberts*, 181 S. C. 303, 187 S. E. 349, 351.

> "For a casual trespass, one resting on his title alone may maintain this action, because trespassers of this description acquire no possession and have nothing to oppose. But where the defendant is in actual possession the case is different; for, as is said in *Amick* v. *Frazier*, (Dud. 340) it would be a 'solecism to say that one can have a constructive possession of that which is in the actual possession of another.' In this contest between actual and constructive possession the latter has always been made to yield, or, as was said in the recent case of *McColman* v. *Wilkes*, (3 Strob. 465 (51 Am. Dec. 637)) 'it is always displaced by any actual possession;' and in the case of *Davis* v. *Clancy & Johnson*, and *Peareson* v. *Danby & Nelson*, already referred to for other purposes, the same principle is fully maintained."

On the basis of the foregoing authority and in the light of at least substantial proof of actual possession by the defendant, it would appear that plaintiff should be required to establish actual, rather than constructive, possession, in order to maintain his action. It might be contended that the jury's verdict for plaintiff has established such possession. But such is not the case where improper evidence was before the jury as to plaintiff's title, so that the general verdict may just [fol. 200] as well have been based upon the jury's conception that plaintiff had title as that he had possession.

From the foregoing analysis, it is definitely established that the judgment below cannot stand. This leaves to be determined the question of whether the case shall be remanded for a new trial or reversed outright on the basis of error in denying defendant's motion for a directed verdict. Since we have determined that the plaintiff did not prove title, this question must turn on whether or not there was sufficient evidence of plaintiff's possession to go to the jury. The facts

that plaintiff paid taxes on the land and that his father gave someone else permission to hunt on the land are matters whose sole probative force is directed to plaintiff's title, not his possession, so that these may be rejected here.

This leaves only two facts: first, plaintiff's testimony of sporadic hunting on the land, concededly not every year and apparently of such limited scope that he never saw the Paper Company's posted signs nor the fire line cut six years before the trespass here complained of; and, second, the cutting of some fallen timber for clapboard at an indefinite time, apparently about eighteen years before the alleged trespass. And even these slender crutches must be evaluated in the light of plaintiff's statement that, after he moved away in 1923, he "didn't do nothing" concerning the property, and the fact that upon his discovery of the timber cutting he made no open protest or complaint of any kind, variety or description.

We cannot convince ourselves that such proof establishes possession, however charitably it may be viewed. If possession was not established, the judge erred in deny-
[fols. 201-202] ing defendant's motion for a directed verdict. We find that possession was not established by any evidence worthy of submission to the jury. The judgment of the lower court is accordingly reversed with direction to enter judgment for the defendant.

Though no motion for judgment notwithstanding the verdict (*non obstante veredicto*) was made in the lower court by the defendant, we think, on the strength of the reasons discussed and the authorities cited in *United States* v. *Halliday* (C. C. A. 4), 116 F. (2d) 812, we have power, (under Rule 50(b) of the Federal Rules of Civil Procedure) instead of ordering a new trial, to direct the entry of judgment by the lower court in favor of the defendant. See, also Dobie, The Revision of the Federal Rules of Civil Procedure, 30 Va. L. Rev. 513, 521.

Reversed.

[fol. 203] UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 5442

WEST VIRGINIA PULP & PAPER COMPANY, a Corporation, Appellant,

vs.

A. N. CONE, Appellee

Appeal from the District Court of the United States for the Eastern District of South Carolina

JUDGMENT—Filed and Entered February 7, 1946

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of South Carolina, at Charleston, with directions to set aside the verdict and enter a judgment for the defendant in accordance with the opinion of the Court filed herein.

Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge. Don Gilliam, U. S. District Judge.

[fol. 203a] Petition for rehearing covering 9 pages filed March 4, 1946 omitted from this print. It was denied, and nothing more by order dated March 15, 1946.

[fols. 204-214] Petition for rehearing covering—pages filed omitted from this print. It was denied, and nothing more by order.

[fols. 215-217] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

ORDER DENYING REHEARING—Filed March 15, 1946

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston

This Court having at its January term, 1946, rendered its decision reversing the judgment of the said District Court appealed from, in this cause, and the appellee having on March 4, 1946, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It Is Now Here Ordered by This Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days.

Morris A. Soper, U. S. Circuit Judge; Armistead M. Dobie, U. S. Circuit Judge; Don Gilliam, U. S. District Judge.

On another day, to-wit, March 21, 1946, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Eastern District of South Carolina, at Charleston, in due form.

Same day, the original exhibits are returned to the Clerk of the U. S. District Court at Charleston, S. C.

[fol. 218] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 184

A. N. CONE, Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER CO.

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the questions of federal procedure raised by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 219] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1946.

No. 184

A. N. CONE, Petitioner,

VERSUS

WEST VIRGINIA PULP & PAPER COMPANY, a Corporation, Respondent.

STIPULATION —Filed November 23, 1946.

Subject to this court's approval, it is hereby stipulated and agreed, by and between Counsel for the respective parties hereto, that under the writ of certiorari in the above entitled case the printed record may consist of the following:

1. Appendix to appellant's brief in the United States Circuit Court of Appeals for the Fourth Circuit.
2. Appendix to appellee's brief in the United States Circuit Court of Appeals for the Fourth Circuit.
3. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that either of the parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

Counsel for respondent contend that, under the order limiting certiorari in this case, the evidence and the exhibits introduced on the trial in the District Court and the record of the motion for a new trial on the ground of after-discovered evidence made in said Court, together with the opinion and order of the District Court thereon, are irrelevant to the questions to be reviewed and should be omitted from the record to be printed for the Supreme Court. This was provided in a stipulation suggested by counsel for respondent but consent thereto was refused by counsel for petitioner. Counsel for respondent, therefore, sign this stipulation only because of the assurance and insistence of counsel for petitioner that he must have this stipulation before the Clerk will print the record as counsel for petitioner desire and have designated, including the portions above contended to be irrelevant.

Counsel for respondent reserve the right to contend on the argument that the portions of the record above referred to are irrelevant to the questions of federal procedure raised by the petition for the writ.

Charles W. Waring, Christie Benet, Counsel for Respondent. H. Wayne Unger, J. P. Mozingo, W. J. McLeod, Jr., Counsel for Petitioner.

November 18, 1946.

(8053)

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FILED
JUN 13 1946
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

W. J. McLeod, Jr.,
H. Wayne Unger,
J. P. Mozingo,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER CO.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your Petitioner, A. N. Cone, respectfully asks this Honorable Court to review on Writ of Certiorari, a judgment of the United States Circuit Court of Appeals, Fourth Circuit, in the case of *West Virginia Pulp and Paper Company* v. *A. N. Cone,* rendered February 7, 1946, as is shown by a true copy of the record herein filed (R. 203). Mandate of the said United States Circuit Court of Appeals, Fourth Circuit, having been dated and filed March 15, 1946 (R. 215), and judgment of the United States District Court for the Eastern District of South Carolina, Charleston Division, pursuant to said mandate, having been dated and filed April 1, 1946.

The matter involved and the reasons relied upon by the Petitioner for the allowance of the Writ are:

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. This was an action of trespass *quare clausum fregit*, commenced by A. N. Cone in the Court of Common Pleas for Colleton County, in October, 1944, and removed by the defendant, West Virginia Pulp and Paper Company to the U. S. District Court for the Eastern District of South Carolina, Charleston Division. Plaintiff claimed under deed and plat from his mother in 1920, clearly defining the close and that he had been paying taxes thereon for more than twenty years, and had enjoyed peaceable possession (see amended Complaint (R. 1)). The defendant entered a general denial.

Trial by jury was held before the Honorable J. Waties Waring, District Judge and a jury at Charleston, South Carolina, at the May Term, 1945.

At trial, plaintiff introduced plat of his grandfather, dated 15 January, 1847 (R. 100); deed from his grandfather, Adam Miles Cone to his father, Miles Cone, dated September 19, 1888 (R. 97); deed from plaintiff's mother to plaintiff, together with plat dated 16 August, 1920 (R. 70-73); certified copy of tax records showing the payment of taxes on the disputed land by his father and mother from 1915 to 1921, and by the plaintiff from 1921 through 1944 (R. 74-75). Plaintiff did not introduce any deed from the father to the mother, but testified that the mother, father and grandfather were in possession of the land (R. 13-14).

The defendant, West Virginia Pulp and Paper Company introduced a deed dated April 5, 1924 (R. 78), and composite plat for some ten thousand acres (R. 77), of adjoining lands, under which plat defendant claimed the disputed property as a part thereof. Defendant further introduced chain of

title to the adjoining lands concerning which there was no dispute.

Plaintiff introduced undisputed testimony that the lands in controversy were not a part of the chain of title claimed by the defendant (R. 155-159). Plaintiff also introduced evidence that the defendant had not paid any taxes on lands claimed by it from 1925 to 1935, and had not paid taxes on the disputed lands from 1936 through 1944; the tracts acquired by defendant allegedly contained Five Hundred Eight (508) acres, and it paid taxes thereon from 1936 to 1944; but its survey of 1924 showed Eight Hundred Sixty Eight (868) acres in order to take in the disputed land adjoining its holdings (R. 177). Plaintiff further introduced evidence of the Sheriff of Dorchester County, South Carolina, that the defendant in 1942 one year after the alleged trespass, attempted to purchase the plaintiff's claim of title and possession at a sale of the lands in dispute for taxes assessed against plaintiff (R. 159, 160, 161 and 179).

It was admitted that the lands were wild, uncultivated, unfenced and uninhabited swamp land, fit only for the growing of timber.

The jury returned verdict for the plaintiff in the amount of Fifteen Thousand ($15,000.00) Dollars, and judgment was entered by the District Court, June 5, 1945. The defendant appealed and the United States Circuit Court of Appeals, Fourth Circuit, in its opinion dated February 7, 1946, reversed the verdict of the lower Court and issued a mandate entering judgment for the defendant (R. 189, 203, 215). The plaintiff, A. N. Cone, petitioned for a rehearing (R. 205-213), and Order denying rehearing was entered on March 15, 1946 (R. 215).

Your Petitioner earnestly prays that a Writ of Certiorari should be granted by this Court to review and reverse the judgment of the U. S. Circuit Court of Appeals, Fourth

Circuit, because said Circuit Court of Appeals, Fourth Circuit (contrary to the applicable local decisions), erred in holding as follows:

(a) That in an action of trespass *quare clausum fregit* the burden of proof to show *perfect* title lies upon the plaintiff.

(b) That in an action of trespass *quare clausum fregit* the burden lies upon the plaintiff to show actual physical possession (*pedis possessio*).

(c) That in an action of trespass *quare clausum fregit*, if title by adverse possession is relied upon, the burden lies upon the plaintiff to show occupancy of the land in *pedis possessio* on every day of the statutory period.

(d) That in an action of trespass *quare clausum fregit*, where the plaintiff relies on adverse possession, that the payment of taxes by the plaintiff for the statutory period is not of probative force as to proof of possessory title.

(e) That in an action of trespass *quare clausum fregit*, where the plaintiff relied on adverse possession, testimony of the possession of the plaintiff's mother and father and grandfather are inadmissible and prejudicial to the defendant.

II

Your Petitioner earnestly prays that a Writ of Certiorari should be granted by this Court to review and reverse the judgment of the Circuit Court of Appeals, Fourth Circuit, because the said Court has decided an important question of Federal Law which has not been, but should be settled by this Court,

The defendant, West Virginia Pulp and Paper Company, moved for a directed verdict, which was denied, but did not move for judgment notwithstanding the verdict (*non ob-*

stante verdicto). The Circuit Court of Appeals, Fourth Circuit, in setting aside the verdict and judgment, and entering judgment for the defendant, took upon itself the authority to enter judgment for the defendant on grounds not set forth in the motion for directed verdict, and in conflict with the evidence and verdict.

The Court bases its authority for such action under Rule 50 B of the Federal Rules of Civil Procedure, and *United States* v. *Halliday,* (116 F 2d 812). The Petitioner respectfully submits that the decisions of this Court and the said Rule do not permit the entering of judgment for the defendant on grounds not set forth in motion for directed verdict, and contrary to the evidence and verdict of the jury.

Your Petitioner respectfully submits that when the Circuit Court found that evidence had been erroneously admitted in the Court below (though this error is denied), it should have sent the case back for a new trial. However, in gratuitously entering judgment for the defendant, without the clear authority to do so, it denied the plaintiff, A. N. Cone, any forum to hear his just complaint which a verdict of twelve jurors had decided in his favor under proper rules of procedure. It might also be pointed out that the entry of judgment for the defendant, through the medium of *res adjudicata,* forever declared title to the disputed lands in the defendant, and the Court of Appeals decision does not even intimate title in the defendant.

III

Your Petitioner earnestly prays that a Writ of Certiorari should be granted by this Court and reverse the judgment of the Circuit Court of Appeals, Fourth Circuit, because the said Court has rendered a decision probably in conflict with applicable decisions of this Court and other Circuit Courts of Appeal. The Circuit Court of Appeals was

bound under the decisions of this Court and other Circuit Courts to view the evidence in the light most favorable to the verdict; to resolve inferences from the testimony in favor of the verdict and against the defendant, and was without authority to reweigh the evidence.

IV.

Your Petitioner earnestly prays that a Writ of Certiorari should be granted by this Court to review and reverse the judgment of the Circuit Court of Appeals, Fourth Circuit, because the decision of the said Court is directly in conflict with the provisions and requirements of Rule 61 of the Federal Rules of Civil Procedure. This Rule prohibits the setting aside of any verdict, or the vacating of any judgment, unless so doing is consistent with substantial justice. Your Petitioner respectfully submits that the Court's action in gratuitously entering judgment for the defendant, instead of sending the case back for a new trial, where the grounds for entering judgment were not set forth or reserved by the defendant in a motion for directed verdict is inconsistent with substantial justice because it confirms superior title in the defendant to the land in dispute, whereas a close analysis of the Court's opinion shows that the said Court never intimated that the said defendant had title to the land because the evidence was uncontradicted that the lands were not a part of the chain of title under which the defendant claimed. Your Petitioner respectfully submits that this is a gross miscarriage of justice, and that he has no house of refuge or protecting arm to right this wrong other than the issuance of a Writ of Certiorari by this Honorable Court.

WHEREFORE, for the foregoing reasons, and because the said decision of the Circuit Court of Appeals, Fourth Circuit, has decided an important question of local law in a

way probably in conflict with applicable local decisions, and has decided important questions of Federal Law which have not been, but should be settled by this Court, and is in conflict with the decisions of this Court and other Circuit Courts of Appeal, your Petitioner prays that a Writ of Certiorari be issued to the United States District Court for the Eastern District of South Carolina, Charleston Division, where the mandate of the United States Court of Appeals, Fourth Circuit, is now filed, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that upon review, that the said judgment and mandate of the circuit Court of Appeals, Fourth Circuit, be ordered reversed and the verdict and judgment of the jury and Circuit Court, in favor of the plaintiff, be restored.

Respectfully submitted,

A. N. CONE,
Petitioner,
By W. J. McLEOD, JR.,
Walterboro, South Carolina;
H. WAYNE UNGER,
Walterboro, South Carolina;
J. P. MOZINGO,
Darlington, South Carolina;
Counsel for Petitioner.

Walterboro, South Carolina,

May 27, 1946.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER CO.

BRIEF FOR PETITIONER

Official Report

The decision of the Circuit Court of Appeals, Fourth Circuit is shown in the record at page R. 189, and is reported 153 F. (2d) page 576.

Statement of Grounds of Jurisdiction

The judgment sought to be reviewed herein was filed by the District Court of the United States for the Eastern District of South Carolina, Charleston Division, on April 1, 1946, pursuant to mandate of the United States Circuit Court of Appeals, Fourth Circuit, February 7, 1946, in which case Petition of the plaintiff, A. N. Cone, for rehearing was denied by the United States Circuit Court of Ap-

peals, Fourth Circuit, by Order filed March 15, 1946, the said Petition for Rehearing having been timely filed.

Jurisdiction of this Court is invoked under Section 347, U. S. C. A., Title 28, Chapter 9, and the revised rules of the Supreme Court of the United States, Rule 38 as set forth in U. S. C. A. 28, and cases therein cited.

As set out in the Petition, this Court has jurisdiction by certiorari to review the failure of United States Appellate Courts to follow the laws as laid down by the Supreme Court of the State of South Carolina affecting land titles.

Beauregard v. *City of New Orleans*, 59 U. S. 497, 15 Law Ed. 469;

White v. *Burnley*, 61 U. S. 235, 15 Law Ed. 886;

Walker v. *State Harbor Commissioners*, 84 U. S. 648, 21 Law Ed. 744;

Suydam v. *Williamson*, 65 U. S. 427, 16 Law Ed. 742.

The Court further has jurisdiction to review decisions of the Circuit Courts of Appeal where that Court has reweighed the evidence and made its own findings contrary to the Rule of this Court, that the general verdict rendered in favor of the Petitioner, A. N. Cone is conclusive as to questions of title, unless there is no evidence to sustain it and this Court has granted certiorari in such a case.

McCaughn v. *Real Estate Land Title and Trust Company*, certiorari granted 56 Supreme Court, 442, 297, U. S. 679, 80 Law Ed. 988.

This Court has further jurisdiction to review the decision of the Court of Appeals because the said Court had no right to deprive the plaintiff of trial by jury, by entering judgment for defendant after verdict for the plaintiff. This Court has granted certiorari in such a case.

Aetna Ins. Company v. *Kennedy*, certiorari granted 57 Supreme Court, 670, 300 U. S. 651. Case reported 57 Supreme Court 809, 301 U. S. 389.

This Court also has jurisdiction to review the decisions of the Court of Appeals rendered contrary to the Federal Rules of Civil Procedure promulgated by this Court.

Statement of Case

All of the relevant facts, the Petitioner believes, are set out in the Petition herein and will be stated in the body of this brief only in so far as will be necessary in the discussion of the questions involved.

Argument

I

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

(a) This was an action of trespass *quare clausum fregit*, commenced in the Court of Common Pleas for Colleton County, South Carolina, by the plaintiff, A. N. Cone, and removed to the United States District Court for the Eastern District of South Carolina, at Charleston, South Carolina, by the defendant, and was tried by the Honorable J. Waties Waring and a jury, at the May Term, 1945.

The plaintiff introduced deed and plat, conveying the land in dispute to him by his mother, Caroline J. Cone, dated 16 August 1920, and clearly defining the close on said plat, (R. 71-73); plaintiff further introduced certified copy of tax records showing payment of taxes on the said land by him from 1921 through 1944, (R. 74-75); plaintiff further testified that he entered upon the said land under said deed, and cut wood and clapboards and hunted the property from time to time for more than twenty years, (R. 3-27); plaintiff's witnesses further testified that they had hunted the land by his permission and that it was known as Cone Land

in the neighborhood and by adjoining land owners, (Testimony of Julia Annoe Driggers (R. 159), John D. Harrison, (R. 155), Robert Williams, (R. 157), Frank Green, (R. 158).

Macedonia Baptist Church v. *City of Columbia*, 10 S. E. 2d, 350, 195 S. C. 59. The Court therein stated:

> "This is not an action to try title. It is one to recover damages for trespass to the property of which the plaintiff was in possession. The deed which plaintiff produced was sufficient to show that the Church was in lawful possession of the property."

The Circuit Court of Appeals held that the plaintiff might do this by "Proof either of actual physical possession, the *pedis possessio*, or by proof of a perfect legal title, from which constructive possession is presumed." (153 F. 2d, page 578).

The correct Rule under South Carolina Supreme Court Decisions is as follows:

> "The important question is thus raised whether plaintiff alleging both title and possession, is entitled to recover damages upon proof of his possession and the invasion of it by the defendant, *without proving also that he has perfect title.* The question must be answered in the affirmative. One person who finds another in possession of the land can not, by seizing the possession or invading it, put him whose possession he seized or invaded to proof of his title. In such a case possession is prima facie evidence of title, and he who invades must establish his title. If this were not so, a holder of land could be put to proof of title against the world by anyone who might choose to trespass or squat upon his lands. This conclusion is well supported by authority. Couch v. Burke, 2 Hill Law 534. Connor v. Johnson, 59 S. C. 115, 37 S. E. 240."
>
> *Beaufort Land and Investment Co.* v. *New River Lumber Co.*, 68 S. E. 637, page 638, 86 S. C. 358.

"This was error because this was an action of trespass *quare clausum fregit* in which form of action it was not legally incumbent upon the plaintiff to recover on the strength of its title, but it was sufficient to make out plaintiff's case by merely showing possession on the part of the plaintiff."

Santee River Cypress Lumber Co. v. *Elliott, et al.*, 150 S. E. 683, page 691, 153 S. C. 179.

(b) The Court of appeals having fallen into error on the burden of proof of the plaintiff to show perfect title as above set forth, erroneously concluded that if no perfect paper title was shown, then the plaintiff must show actual physical possession of the land in order to prove title by adverse possession. Under the *Macedonia* case (*supra*), the introduction of the plaintiff's deed recorded some twenty-one years prior to the alleged trespass, clearly defining the close by plat, was proof of plaintiff's constructive possession for more than the statutory period. Since the land was admittedly uncultivated, uninhabited, swamp land, fit only for the growing of timber, it can not be said that the plaintiff was forced to live on the land to be in actual physical possession of it (*pedis possessio*). The correct Rule, as stated by the South Carolina Supreme Court, is as follows:

"The possession of the Bardins was adverse and continuous for more than twenty years; and while the land in question was not cultivated or inclosed, it was used for the supply of fuel and timber, the ordinary uses for which such land was fitted. Code Civ. Proc. 1902, paragraph 103. The payment of taxes on the land for a number of years by the Bardins was also some evidence to be submitted to the jury on the ground whether the state had parted with title."

Bardin, et al., v. *Commercial Insurance and Trust Co.*, 64 S. E. 165, 82 S. C. 358.

D. W. Alderman and Sons v. *McKnight*, 95 S. C. 245, 78 S. E. 982.

(c) The Circuit Court, having erroneously concluded that if the plaintiff did not show perfect paper title, he must show actual physical possession, *(pedis possessio)*, further erroneously held that if the plaintiff relied on title by adverse possession he must show actual physical occupancy of the land on every day of the statutory period.

The testimony of the plaintiff that he entered upon the land, hunted and cut wood thereon is undisputed and is sufficient entry under his deed to start the claim of possession. The general rule is stated as follows:

> "It has been well said that the pursuit of game, the occasional cutting of trees or the gathering of herbage or wild fruits, and the like, furnish no presumption that the entry has been made for the purpose of taking possession, *although it is otherwise where one enters under a deed which defines his claim.* 52 Am. Jur. Section 28, page 857.

The Court of Appeals in its opinion, in holding that the plaintiff, in order to prove title by adverse possession, must actually occupy the land in *pedis possessio* for every day of the statutory period, cites the case of *Cathcart* v. *Matthews*, 105 S. C. 329, 39 S. E. 121. Whereas, the South Carolina Supreme Court, in the said case, actually laid down the correct S. C. Rule, as later quoted in *Gore, et al,* v. *Whiteville Lumber Company*, 96 S. E. 683, page 684, 110 S. C. 474, as follows:

> "In Cathcart v. Matthews, it was pointed out as had been held before, that possession, actual or constructive, is sufficient to maintain an action of trespass quare clausum fregit, and further that, even in a claim of adverse possession, the rule requiring continuity of possession does not mean that the person in possession, his agent or tenant, must be actually on that land during the whole of the statutory period, but the actual possession, once taken, will continue, though the party

taking such possession should not continue to rest with his foot upon the soil until he be disseized or do some act amounting to an abandonment of the possession. We may add that, in determining the question of possession, the character of the land is entitled to due consideration, for according to its nature the acts and facts which constitute possession may vary. Naturally, they are different in the case of woodland or swamp, or lands covered by water, from what they are when it is cultivated or susceptible of actual use and occupancy."

(d) The Court further erred in holding that the plaintiff's payment of taxes on the disputed land for more than twenty years was without probative force as to proof of possessory title. The Court of Appeals, in its opinion, stated:

"The fact the plaintiff paid taxes on the land and that his father gave someone else permission to hunt on the land are matters whose sole probative force is directed to plaintiff's title, not to his possession, so that these may be rejected here."

Section 2605 of the Code of Laws of 1942, for South Carolina, provides:

"That all lands shall be listed and assessed as the property of the person or persons having the legal title to and the right to possession of—."

The Supreme Court of South Carolina, in construing the effect of this statutory provision has held such testimony to be of probative force in proof of adverse possession. That Court has said:

"When we come to the return for taxation being made in the name of James Stuart, it seems to me we have a very strong circumstance to support his claim. —I find it sufficient proof of adverse possession and of a grant—."

Campbell v. *Stuart, et al.*, 84 S. E. 415.

It might be stated at this point that the Court probably fell into this error because it was faced with the fact that the defendant did not pay taxes on any land in the School District in which the disputed land lies from 1924 to 1935, (R. 177-178), and probably did not pay any taxes on the disputed lands from 1936 to 1944, (the tract of land conveyed to the defendant being composed of Five Hundred Eight (508) acres and claimed to be included in said tract by the defendant by virtue of a survey in 1924 showing the acreage to be Eight Hundred Sixty Eight (868) acres, and the boundaries including the disputed property). The defendant's witness, although testifying that the defendant paid taxes from 1924 to 1935, inclusive, on cross examination admitted that the bundle of receipts exhibited to the Court and jury as tax receipts of the defendant were in reality tax receipts of some other corporation which never held title to the land (appellee's appendix R. 13, page 51).

The Court of Appeals fell so far into error, and showed its unfamiliarity with the provisions and effect of the land tax system of South Carolina and in reweighing this evidence, stated:

> "It is most unfortunate that the system of keeping the land records for taxation in this region was such that it is almost entirely impossible to determine with any measure of certainty, just what parcel or parcels of land were covered by a particular tax payment. The inadequacy of this system also accounts for the otherwise curious fact that the state would accept, without inquiry, an unlimited number of duplicate payments of taxes by different parties, on the same tract of land for the same year. In such a state of the records, it does not appear that material reliance by either party upon payment of taxes is really justifiable." (153 F. 2d, page 580.)

Your Petitioner respectfully submits that this is an unwarranted attack upon the taxation system of the Sovereign

State of South Carolina; that the above quoted provision of the South Carolina law for the return and assessment of land is clear and simple and that the testimony of the defendant does not warrant an assumption of duplicate payments or the allegation of "inadequacy of this system".

(e) The Court of Appeals held that the oral testimony of the plaintiff and his witnesses, that prior to the execution of the deed from his mother to him in 1920, his mother was in possession of the property, and that prior to his mother his father was in possession of the property under deed from his grandfather, and that his grandfather was in possession before deed to his father, since before the Civil War, was prejudicial error and was inadmissible. The plaintiff's possession under title from his mother, existed for more than twenty years and was sufficient in itself to establish adverse possession as above argued. It certainly could not have been prejudicial to the defendant to permit the oral testimony as to the possession of his mother, father and grandfather. This is most especially true since possession of the plaintiff, his mother, his father and grandfather was shown by other evidence, such as payment of taxes, knowledge of the community and adjoining landowners that the disputed land was Cone Land.

> "In an action involving the question of adverse possession of land, testimony of witnesses as to the actual possession of the land is admissible; but actual possession cannot be shown by the payment of taxes, by a deed describing the land or an invalid grant by the State or by evidence that the land was known in the community to belong to the adverse claimant and neither are declarations of the adverse claimant that the property was his admissible to prove the possession, *although it may be competent proof of possession otherwise shown*." 2 C. J. S. Section 221, pages 827, 828.

II

The Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court. At the conclusion of the testimony, the defendant moved for a directed verdict on the grounds "the proof deduced by the defendant, we feel, substantiates title conclusively in this land in the defendant and not in the plaintiff, as he attempted to show" (R. 58). The grounds for directed verdict moved by the defendant were not based on superior possession of the defendant, but on superior title. After verdict for the plaintiff and judgment thereon in the amount of Fifteen Thousand ($15,000.00) Dollars, the defendant made no motion, notwithstanding the verdict. When the defendant appealed, nowhere in its brief did it request judgment be entered on its behalf on the grounds that it had shown under all the evidence, superior possession.

A close analysis of the opinion of the Court of Appeals fails to reveal any intimation by that Court that the defendant proved superior title. As a matter of fact, the evidence is uncontradicted that the disputed land was not a part of the chain of title under which the defendant claimed. Testimony of John D. Harrison (R. 155), Robert Williams (R. 157), Frank Green (R. 158).

The Appellate Court evidently bases its reversal of the verdict and judgment for the plaintiff, and entry of judgment for the defendant, upon the grounds that the defendant had proved superior possession, after reweighing the evidence, although the grounds upon which verdict and judgment was reversed is singularly hidden.

> "Since the defendant has also undertaken to show its own actual possession, it is in order to consider the legal status of two conflicting claims of possession at the same time." (153 F. 2d, page 58[illegible].)

The Appellate Court cites as its authority to reverse verdict of jury and judgment of the Circuit Court and to enter judgment for the defendant, the case of the *United States* v. *Halliday*, 116 F. 2d, 812, and Rule 50B of the Federal Rules of Civil Procedure. Neither this case nor the said Rule, or any case cited under said Rule, have ever held that the Appellate Court had the power to reverse verdict and judgment and enter judgment for the defendant where the grounds for reversal are different from the grounds laid by the defendant in a motion for a directed verdict, without subsequently moving for judgment, notwithstanding the verdict.

Your Petitioner respectfully submits that this Federal question should be decided by this Honorable Court, and respectfully submits that the Rule should properly be that the Appellate Courts are without such authority, since the reason for permitting any power in the Appellate Court to reverse and enter judgment for the defendant is based upon the legal implication of Rule 50B of Rules of Federal Procedure that all legal rulings of the District Courts on grounds for motion for directed verdict are reserved by said Rule in the Appellate Court. Obviously, where the grounds are not reserved, the Appellate Court can not supply such grounds of its own volition. This is most especially true where, as in this case, the grounds for reversal were based on superior possession in the defendant under conflicting testimony, which issue was decided by the verdict of the jury.

III

Your Petitioner respectfully submits that the decision of the Appellate Court in this case is probably in conflict with applicable decisions of this Court and other Circuit Courts of Appeal.

The Court was bound under the decisions of this Court, and other Courts of Appeal, to view the evidence in the light most favorable to the verdict, and to draw all inferences or conclusions from the evidence in favor of the jury's verdict, and the Appellate Court was without authority to reweigh the evidence and set aside the verdict merely because a jury could have drawn other inferences or conclusions.

Cole v. *Chicago St. P. M. & O. R. R. Co.*, 59 Fed. Supp. 443;

Boston and Marr v. *Cabana*, 148 F. (2d) 150;

McCaughn v. *Real Estate Land Title and Trust Co.*, 56 Sup. Ct. 604, 297 U. S. 606, 80 L. Ed. 879.

Although there was conflicting evidence of the same type possession by the plaintiff and by the defendant in the record, the jury rendered a verdict in favor of the plaintiff. The Appellate Court, in its opinion, stated:

> "It might be contended that the jury's verdict for the plaintiff has established such possession, but such is not the case where improper evidence was before the jury as to plaintiff's title, so that the general verdict might just as well have been based upon the jury's conception that plaintiff had title as that he had possession."

This inference should have been resolved in favor of the verdict which should have caused the Court of Appeals to hold that the verdict was based on possession in the plaintiff.

The Appellate Court, in its opinion, further concluded that the plaintiff, upon learning of the trespass, "made no open protest or complaint of any kind, variety or description," whereas the record shows that the plaintiff imme-

diately employed counsel to repreesnt him (R. 18-19). Your Petitioner respectfully submits that such evidence should have been construed in favor of the plaintiff and in afvor of the verdict since it is in the interest of the orderly administration of justice that laymen should employ counsel to take the necessary legal steps to prevent trespasses, rather than to provoke breaches of the peace.

The testimony is undisputed that, over a year after the alleged tresepass complained of, the defendant attempted to purchase the plaintiff's claim to the land at a sale by the Sheriff of Dorchester County, South Carolina, for taxes on the said land assessed in the name of the plaintiff (R. 159, 161, 179). This inference from the testimony that the defendant admitted plaintiff's claim of title and possession, and attempted to validate the trespass by purchase of the plaintiff's claim, was ignored by the Appellate Court and should have been viewed in the light most favorable to the plaintiff and to the verdict.

The Appellate Court, in its opinion, further stated:

> "In this connection, it may be noted that plaintiff's deed from his mother, contrary to almost universal practice, makes no mention whatsoever of the source of the grantor's title."

The Court construed this as an inference of the evidence against the plaintiff and against the verdict by reasoning that the absence of such a recital indicated there was no source of title into the mother, whereas such inference should have been resolved to the contrary. Despite the fact that no such evidence appears in the record, that such is the universeal practice in South Carolina, ample proof can be exhibited that such is not the universal practice in land matters in South Carolina.

IV

The decision of the Appellate Court is directly in conflict with the provisions and requirements of Rule 61 of the Federal Rules of Civil Procedure. Said Rule provides as follows:

> *Rule 61. Harmless Error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The Court's action in entering judgment for the defendant, despite the fact that the grounds for such action were not laid or reserved under a motion for directed verdict, and that no motion *non obstante veredicto* was made, and despite the fact that the opinion does not intimate superior title in the defendant, the entry of judgment for the defendant through the medium of *res adjudicata*, confirms title in the defendant. This is contrary to the undisputed evidence and contrary to the verdict and denies the plaintiff of his right to trial by jury.

> *Aetna Ins. Company* v. *Kennedy*, 57 Sup. Ct. 809, 301 U. S. 389, 81 L. Ed. 1177, certiorari granted 57 Sup. Ct. 670, 300 U. S. 651.

Your petitioner submits that such action is not consistent with substantial justice.

WHEREFORE, your Petitioner respectfully submits that the opinion and mandate of the Circuit Court of Appeals,

Fourth Circuit, entering judgment for the defendant, should be reviewed and reversed.

A. N. CONE,
Petitioner;
W. J. MCLEOD, JR.,
Walterboro, South Carolina;
H. WAYNE UNGER,
Walterboro, South Carolina;
J. P. MOZIBO,
Darlington, South Carolina,
Counsel for Petitioner.

Walterboro, South Carolina.
May 27, 1946.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP & PAPER COMPANY.

PETITIONER'S BRIEF ON CERTIORARI

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

JEFFERIES, MCLEOD & UNGER,
H. WAYNE UNGER,
Walterboro, South Carolina;
W. J. MCLEOD, JR.,
Walterboro, South Carolina;
J. P. MOZINGO,
Darlington, South Carolina;
Counsel for the Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP & PAPER COMPANY.

PETITIONER'S BRIEF ON CERTIORARI

To the Honorable Supreme Court of the United States:

This Honorable Court having granted certiorari in the above entitled case, limited to the questions of the Rules of Federal Procedure, as set forth in Petition for Writ of Certiorari, your Petitioner respectfully asks this Honorable Court to reverse the decision of the Circuit Court of Appeals, Fourth Circuit, and to enter judgment and verdict for the Plaintiff as entered by jury and court, United States District Court for the Eastern District of South Carolina, Charleston Division, dated May 22, 1945, or to reverse the judgment of the Circuit Court of Appeals and remand to the District Court, Charleston Division, for a new trial or for such other or further relief as this Honorable Court shall deem equitable, just and proper.

The plaintiff would respectfully show this Honorable Court as follows:

Official Report

The decision of the Circuit Court of Appeals, Fourth Circuit, is shown in the record at page R. 139, and is reported 153 F. (2d) page 576.

Statement of Grounds of Jurisdiction

The judgment herein reviewed was filed by the District Court of the United States for the Eastern District of South Carolina, Charleston Division, on April 1, 1946, pursuant to mandate of the United States Circuit Court of Appeals, Fourth Circuit, February 7, 1946, in which case Petition of the plaintiff, A. N. Cone, for rehearing was denied by the United States Circuit Court of Appeals, Fourth Circuit, by Order filed March 15, 1946, the said Petition for rehearing having been timely filed.

Jurisdiction of this Court is invoked under Section 347, U. S. C. A., Title 28, Chapter 9, and the revised Rules of the Supreme Court of the United States, Rule 38, as set forth in U. S. C. A. 28, and cases therein cited, it being the position of the plaintiff that the said decision of the Court of Appeals was rendered contrary to the Federal Rules of Civil Procedure promulgated by this Court, and the Seventh Amendment to the Constitution of the United States.

Statement of Case

This was an action of trespass *quare clausum fregit* commenced by A. N. Cone in the Court of Common Pleas for Colleton County, in October, 1944, and removed by the defendant, West Virginia Pulp and Paper Company to the United States District Court for the Eastern District of South Carolina, Charleston Division. The plaintiff al-

legal he was owner of and had been in quiet and peaceable possession of a tract of land One Hundred Six (106) acres located in Dorchester County, South Carolina, having claimed the property under deed and plat from his mother in 1920, which plat clearly defined the close; that he had paid taxes under said deed for more than twenty years and had enjoyed the peaceable possession thereof; that the boundary lines of the said tract were well defined and marked, having been laid out by the plaintiff and by former owners more than twenty years and acted upon and acquiesed in by them and all subsequent owners; that during the month of September, 1941, the defendant, West Virginia Pulp and Paper Company, without plaintiff's knowledge or consent cut, destroyed and carried off a large quantity of timber, damaging the plaintiff in the amount of Twenty-Five Thousand ($25,000.00) Dollars. (See amended Complaint R. 1.)

The defendant entered a general denial raising the issues of fact of title and of possession to be tried by jury after due demand. Trial by jury was held before the Honorable J. Waties Waring, District Judge, and a jury at Charleston, South Carolina, at the May Term, 1945.

At the trial, the plaintiff introduced a deed from his mother dated 16 August 1920, recorded same day (R. 51), and plat describing the land by James A. Postell, Surveyor, dated August 16, 1920 (R. 54), and certificate of payment of taxes on the said described land from 1921 to 1944 (R. 55). Plaintiff also claimed this certificate showed that his father paid taxes on Three Hundred Eighty-Five (385) acres of land up to 1916, and that in 1917, the father returned only Three Hundred Twenty (320) acres of land and that his mother, Mrs. C. F. Cone, began in 1917 to return a tract of land in this School District up until 1921, when she conveyed it to the plaintiff. It was the plaintiff's testimony that this was some evidence of a transfer of the disputed land from

his father to his mother in 1917, although he knew nothing of a deed from the father to the mother.

Plaintiff further introduced deed from his grandfather, Adam Miles Cone, to his father, Miles Cone, dated September 19, 1888 (R. 68) and identified the property in dispute as a part of the said conveyance, and also introduced plat of his grandfather, Adam Miles Cone, dated January 15, 1847, and identified the disputed land as being a part of the 1847 plat (R. 71). The plaintiff further testified that his mother, father and his grandfather had successively laid claim to and had been in possession of the land since prior to the War Between the States, at which time the land records were destroyed (R. 11). The plaintiff's brother, Owen Cone, substantiated plaintiff's testimony that the mother, father and grandfather were in possession of the land and that it was a part of their holdings since he now owns the balance of the estate (R. 27-8).

Plaintiff further introduced oral testimony of old residents of the neighborhood that the land had always been known as Cone land and had never been a part of lands purchased by the defendant (John D. Harrison, R. 105; Robert Williams, R. 108; Frank Green, R. 109; Julia Anne Driggers, R. 110). This was admitted on cross-examination of the defendant's witness (Wesley N. Cone, R. 112; John Harvey Cone, R. 113).

The plaintiff's claim of title and possession in himself and his ancestors was further shown by admission of the defendant, by its attempt to purchase his claim at a tax sale by the sheriff of Dorchester County, after the trespass complained of, at which sale the defendant bid in the land sold in the name of the plaintiff. (Testimony of H. H. Jessen, Sheriff of Dorchester County, R. 111-112).

The plaintiff testified he hunted on the property all of his life, sometimes as long as a week, and got clapboards and

wood, covering for barns and houses, two and three foot boards (R. 13, 16). He further testified his father before him hunted the property and got out plyboards (R. 8). He denied that there was a fire line cut on the property, or that the defendant had posted the property for no trespassing (R. 13). The plaintiff's brother, Owen Cone, testified that he owned the remainder of the plaintiff's father's estate, composed of Three Hundred Twenty (320) acres adjoining the disputed property on the west (R. 28); that he was familiar with the disputed property which had been formerly a part of the plaintiff's father's holdings, and that he had never seen a fire line on the property (R. 30).

The disputed property was bounded on the north by an ancient canal and on the east and west by ancient canal banks, which had been in existence since before the War Between the States. The crux of the dispute over the property revolved around the defendant's attempt to extend the Waring Plantation south of the ancient canal in order to take in the disputed property (see defendant's exhibit No. D. 1, composite plat R. 56A). The plaintiff's oral testimony from older men who had lived on the defendant's Waring Plantation all of their life, one of whom had even rented it for years, denied that the Waring Plantation ever went south of the canal; and stated that Cone land lay south of that ancient canal (John D. Harrison, R. 105; Robert Williams, R. 108; Frank Green, R. 109-10), was uncontradicted.

The plaintiff further introduced testimony to show that the defendant did not lay claim to the land in dispute by introducing tax records (R. 129-31) showing that the defendant did not return any land for taxes in the School District in which the disputed land lies from 1925 to 1935 (the defendant claiming under deed from one J. Lamb

Perry in 1924), and that the defendant probably paid no taxes on the land in dispute from 1936 to 1944, the date of trial, since they returned the property under which they claimed title, as Five Hundred Eight (508) acres known as the Waring tract.

> *"The payment of taxes is not evidence of title, as is supposed in popular myth, but failure to pay is evidence that no claim was made."* Gadsden *v.* Westshore Investment Company, 99 S. C. 172, 82 S. E. 1052-1053.

The deed to the defendant from J. Lamb Perry, dated April 5, 1924 (four years later than the plaintiff's deed), increased the acreage of the Waring Plantation (by defendant's survey), from Five Hundred Sixty-Three (563) acres to Eight Hundred Sixty-Eight (868) acres, as conveyed to the defendant's grantor (R. 59) in order to include the disputed land. The said deed to the defendant's grantor dated 1899, states that the said Waring Plantation had been composed of Five Hundred Sixty-Three (563) acres for more than forty years prior to 1899. The Five Hundred Sixty-Three (563) acres it is admitted was composed of two tracts of Five Hundred (500) acres and Sixty-Three (63) acres which were not contiguous and only the Five Hundred (500) acre tract joined the disputed property.

The defendant, West Virginia Pulp and Paper Company, introduced a deed dated April 5, 1924 (R. 57) and composite plat of some ten thousand acres (R. 56A) of adjoining lands, which plat the defendant claimed included the disputed property. The defendant further introduced a chain of title to the adjoining lands (known as the Waring Plantation), concerning which chain of title the plaintiff laid no dispute other than to deny identification of the disputed property as a part thereof. The defendant introduced oral testimony that a fire line had been cut on the disputed property by the CCC Boys (probably in 1935, the

active year of the CCC), and that the defendant's woods riders had travelled over the disputed property posting trespass notices and warding off trespassers (Hill Beach, R. 31; Howell Bivens, R. 35; Tom Peeples, R. 39).

On cross-examination, the defendant's caretaker, Mr. Howell Bivens, admitted that although he had been in charge of the defendant's properties for eighteen years, from 1925, he had been on the disputed property only three times (R. 115-16). The defendant's witness, Russell E. Haynes, testified on direct examination that the defendant had paid taxes on the disputed land from 1925 to 1940 (R. 123), and on cross-examination, when he was forced to exhibit the tax receipts to the jury, it was admitted that the taxes were not paid by the defendant but the bundle of exhibits were, in reality, tax receipts of a different corporation for huge, unidentified acreages of land (R. 126-8).

It was admitted that the lands were wild, uncultivated, unfenced and uninhabited swamp lands, fit only for the growing of timber.

The jury returned a verdict for the plaintiff in the amount of Fifteen Thousand ($15,000.00) Dollars, and judgment was entered by the District Court, June 5, 1945. The defendant appealed and United States Circuit Court of Appeals, Fourth Circuit, in its opinion dated February 7, 1946, reversed the verdict of the lower Court and issued a mandate entering judgment for the defendant (R. 139-149, 150).

The plaintiff, A. N. Cone, petitioned for a rehearing and an Order denying rehearing was entered on March 15, 1946 (R. 149). The plaintiff petitioned for a Writ of Certiorari dated May 27, 1946, being duly filed, and Writ of Certiorari was issued by this Honorable Court dated the 14th day of October, 1946.

ARGUMENT

I

The action of the Circuit Court of Appeals in Reversing the verdict and judgment of the Circuit Court and in gratuitously entering judgment for the defendant is directly in conflict with Rule 38 of the Rules of Civil Procedure and beyond the authority of Rule 50-B of the Rules of Civil Procedure.

Rule 38 of the Rules of Civil Procedure provides: "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Under all the evidence in the case, the issues of fact presented to the jury for their determination and passed upon by them were in the main composed of two propositions. As clearly stated by His Honor, J. Waties Waring, in his charge to the jury, "Your consideration of the case is whose property was it, whose timber was it,—If you find the lands were Mr. Cone's you must find the damage to his and assess that in money. It is a pure and simple business matter. There is not sentimental matter in this case, it is a simple business matter, who owned the land, who owned the trees on the land" (R. 45).

This able jurist, in his charge to the jury, went to great lengths to make clear these issues of fact and later (R. 47) charged them: "Now, gentlemen, each side claims to have been in possession; each side claims to have been in lawful possession, and I think that is the most important thing you have to decide because *each side claims it had legal title and possession was based upon legal title* and if you should

find one side was in possession and the other side was not in possession that would be your verdict in this case."

The court in its charge further pointed out that on these issues of fact there was conflicting testimony. The court stated: "Now, gentlemen, in this case each side has claimed title and each side has put in deeds of title, deeds, written papers by which each attempts to trace his or its title down to the present date" (R. 46).

"Now, then, for the plaintiff, Cone, there was testimony of certain witnesses that the lines were there, the canal was spoken of as the line separating it from the Waring or Perry tract of land. There was testimony the former owner, Mr. Lamb Perry, said that canal was the line, 'you mustn't go across it'—and there is evidence that some of them went upon the land, they say it was this same tract of land and that they hunted and that Mr. Perry hunted after he conveyed it. These witnesses conflict. You have got positive testimony by numerous witnesses as to where the line was and you have a good deal of testimony as to possession on behalf of the plaintiff. The possession testimony amounts mainly to plaintiff's own testimony. He says he hunted on the place from time to time, over a course of years; he says that he cut some boards from fallen timber, and that he took off some posts. On the other hand, the defendant company, through certain of its agents and employees, say that they posted the land, that they plowed up and burned fire lines or fire-breaks and that they went over it from time to time to see that there was no poaching;—It is for you, and you solely, to determine whom you believe and what you believe" (R. 47-8). "We have two plats, one made and introduced in behalf of the plaintiff and one introduced and made on behalf of the defendant. One shows the property as belonging to Mr. Cone and the other shows the property as belonging to West Virginia Pulp & Paper

Company. You have heard considerable testimony as to boundaries, the canal and as to common knowledge and hearsay in the community, you have heard a number of witnesses for the plaintiff, others for the defendant, some employees of the company, some former employees, some of them with no connection, two of them named Cone testifying these were not Cone lands; other Cones testified they were Cone lands. Now, gentlemen, these facts are for you to determine and you entirely" (R. 49). Under this charge, the jury found for the plaintiff in the amount of Fifteen Thousand ($15,000.00) Dollars.

After these clear issues of fact under conflicting testimony were drawn, just prior to the Court's charge, the defendant moved for a directed verdict. The defendant's motion is quoted at R. 42, and applying Rule 50 (a) of the Rules of Civil Procedure the specific grounds of the defendant's motion were "' he proof deduced by the defendant, we feel substantiates title conclusively in this land in the defendant, not in the plaintiff, as he attempted to show." The defendant's motion did not give as grounds that the defendant had under all the evidence proved superior possession. This undoubtedly was due to the fact that the evidence on possession was so nearly equalized that the defense relied entirely on their chain of title.

The Circuit Court of Appeals in its opinion (R. 139) (153 F. (2d) 576) completely ignored the defendant's proof of paper title since the evidence was so obvious that the disputed land was not a part of the defendant's chain of title and apparently entered judgment for the defendant based on its version of the evidence that the defendant had proved superior possession.

The Seventh Amendment to the United States Constitution, and Rule 38 of the Rules of Civil Procedure, are in-

tended to preserve inviolate one of the most precious rights given by the Anglo-Saxon race to the world. The whole history of the right to trial by jury is predicated on the inherent wisdom of twelve laymen to discern the truth from testimony and evidence. One of the most compelling necessities for which the jury system was established was to decide the issues of ownership and possession of lands. The right under our Constitution of a citizen to hold his land peaceably against the privileged and powerful is one of the most sacred pillars of our civilization and way of life. The crux of this case was simply stated by the trial justice to be the fact of whose land was it, Cone land or Waring land, since the memory of man runneth not to the contrary. As to these facts, there was a substantial conflict of testimony.

In *Baltimore & Carolina Line* v. *Redman* (55 Supreme Court 890, 295 U. S. 654) this Court apparently laid down the rule that the Circuit Courts of Appeal, under Rule 50-B could reverse a verdict and judgment and enter a contrary verdict and judgment for the opposite party based on the ground that all questions of law passed upon by the trial court were reserved for analysis in the appellate court. There was under the common law at the time of the establishment of the United States Constitution a recognized custom of permitting such action, where certain procedural requirements were complied with, such as reserving questions of law set up on motions to dismiss and for a directed verdict. These cases have held that such procedural reservation of the questions of law is no longer necessary in cases where the grounds for the motion for directed verdict or notwithstanding the verdict were based on the insufficiency of the evidence to support the verdict. (See *Baltimore & Carolina Line* v. *Redman*, 296 U. S. 654 ,55 Supreme Court 890, at page 892.)

In this case, the motion for a directed verdict by the defendant was not based on the sufficiency of the evidence to establish superior possession in the defendant (as held by the appellate court) but was specifically grounded on the superior weight of the evidence that the defendant had legal title to the diputed lands (see defendant's motion R. 42), so that no reasonable man could differ as to the fact of title.

Under the loose common law procedure, the defendant could simply move for a directed verdict on the ground that the evidence was insufficient to support the verdict. However, the present Rules of Civil Procedure, which were adopted with an eye to the ruling of this Court in *Slocum* v. *New York Life Insurance Company* (228 U. S. 364, 33 Supreme Court 523), and *Baltimore & Carolina Lines* v. *Redman* (295 U. S. 654, 55 Supreme Court 890), now require that a "motion for directed verdict shall state the specific grounds therefor." (Rules of Civil Procedure, 50(a).)

> "The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the Federal cases." (16 U. S. Supreme Court Digest, Note to Rule 50(a), page 297.)

Therefore, the appellate court was restricted to an analysis of the defendant's proof of superior title as a matter of law. The plaintiff submits that a close examination of the opinion of the Circuit Court of Appeals in the instant case patently shows that this proposition of law was not analyzed by that Court nor was their reversal based on a conclusion that the evidence showed superior title in the defendant. If the appellate court's decision had been based on weight of the evidence of title in the defendant, their action would have been justified only to "Grant directed verdict when the evidence is such there are no controverted issues of fact upon which reasonable men could differ."

(*McIlvaine Patent Corp.* v. *Walgreen Company*, 138 F. (2d) 177, and cases therein cited on page 179.)

> "In an equity suit it is the duty of this court to direct the lower court to enter the decree which should have been entered, but in a law case this court is merely a reviewing court and cannot retry the case and direct the entry of the judgment which it thinks should have been entered." (*Millers Mutual Fire Insurance Association* v. *Warroad Potatoe G. Association*, 94 F. (2d) 741, at page 743 and citations thereunder.)

> "Rules of common law permitting judgment non obstante verdicto and arrest of judgment on verdict include only those cases in which pleadings present no material issue requiring trial or verdict." (Rose's Notes on U. S. Reports, Volume 20, page 810.)

The appellate court instead of passing upon the sole question of law as to the superior evidence of title in the defendant, ignored these grounds. "Since the defendant has also undertaken to show its own actual possession, it is in order to consider the legal status of two conflicting claims of possession at the same time. (*West Virginia Pulp & Paper Company* v. *A. N. Cone*, R. 146-7, 153 F. (2d) at page 581.) The appellate court then proceeded to re-examine the testimony and to re-weigh it and came to the erroneous conclusion, "This proof of the defendant showed the cutting of an extensive fire line by the CCC on behalf of the Paper Company, the regular maintenance and clearance of this line by Company agents, the regular posting of the property by the Paper Company, entry upon the property to guard against poachers and fire hazards at intervals of about once a week by an agent of the Company, and finally the entry (herein complained of) when the bulk of the timber on the property was cut. It is difficult to see that defendant could have done much more to assert its possession." (153 F. (2d) at page 580, R. 144.)

Had the appellate court been present at the trial, it would not have drawn the erroneous conclusion that the agents of the company went on the property once a week and regularly maintained extensive fire lines and regularly posted trespass notices. The issue of the credibility of the defendant's witness was a matter entirely for the jury to settle and not a question of law. As has been ably stated by Judge Faris in case of *Yutterman* v. *Sternberg* (86 F. (2d) 321, 324), "Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mein. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify."

The trial justice was impressed by the defendant's witnesses and evidence of title in an entirely opposite manner from the Circuit Court of Appeals, and with reference to the defendant's proof of title. At page R. 104 the court stated, "As a matter of fact, all of the testimony as to title was vague and uncertain. The defendant itself attempted to

prove title and yet there was a hiatus of many years duration wherein this property did not appear in its name on the tax books. In the defendant's attempt to prove title its showing of the acreage it obtained did not at all coincide with that shown on the plat. The surveyor who made the compiled plat of this and other contiguous properties was not called although there was no showing that he could not be located."

"As a matter of fact, as above stated, the matter of title was not clearly proved by either plaintiff or defendant and the main point argued to the jury was that of possession.—But plaintiff did not have to prove perfect legal title. He could rely on a legal possession. The main point submitted to the jury was who was in lawful possession, and there was conflicting evidence."

The above impressions of the evidence left with the Circuit Judge and the jury as to the issues of title and possession can readily be seen to be at great variance with the impressions drawn by the Court of Appeals from the printed abstract in that court which led it to state: "It might be contended that the jury's verdict for the plaintiff has established such possession. But such is not the case where improper evidence was before the jury as to plaintiff's title, so that the general verdict may just as well have been based upon the jury's conception that the plaintiff had title as that he had possession." (R. 147.)

It is submitted by the Plaintiff that the basis of the Appellate Court's ruling was applying its own test of the credibility of the plaintiff's testimony. The court states: "The quality of the plaintiff's proof as to any such possession left much to be desired. Accepting his own testimony at face value, he had hunted on it, though not every year, had cut and sawed some fallen trees for clapboard in 1923 or 1925

'and all through there', and would camp upon it for as much as a week at a time during hunting season. However, he had never posted it, claimed never to have seen either the fire line cut by the CCC in 1935 or the posted signs regularly maintained by the defendant, both of which were testified to by several witnesses, and finally summarized his actions in the following words. 'After I moved away from there (in 1923) I didn't do nothing.' Aside from this testimony, the only other evidence of his possession was that he paid taxes on the property and that his father, in his behalf, had given one other individual permission to hunt on the property" (R. 142). The credibility of this witness was fully understood by the jury and full weight given to his testimony by the verdict, the plaintiff being an uneducated man over sixty years of age and being very ill. The record shows that the case was postponed from the January term to the May term, 1945, because of the plaintiff's serious illness, from which he almost died, "Yet there was about the witness that carried conviction of truth to every soul who heard him testify", although he may have testified "so that it reads brokenly and obscurely in print."

The appellate court was without authority either to test the credibility of the plaintiff's testimony of possession or the defendant's testimony of possession, since such is an issue of fact and "a finding of fact contrary to the weight of the evidence is an error of fact which cannot be reviewed." (*United States* v. *Washington Dehydrated Food Company*, 89 F. (2d) 606 at page 609 and cases therein cited.) Thus, even were the weight of the evidence against the plaintiff (which is denied), such would be an error of fact. And, even were the case not one at law for a jury to decide, but one in equity for the court to decide, "Errors

alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this Court, if there was any evidence upon which such findings could be made." (*United States* v. *Washington Dehydrated Food Company, supra*, citing *Hathaway* v. *National Bank*, 134 U. S. 494, 498, 10 S. Ct. 608 and other cases.)

The opinion of the Circuit Court of Appeals further evidences its invasion of the function of the jury by reweighing the value of the plaintiff's evidence as to payment of taxes by him for more than twenty years and by reweighing plaintiff's evidence that the defendant did not pay taxes on the disputed property. Section 2605 of the Code of Laws of South Carolina for 1942 provides: "That all land shall be listed and assessed as the property of the person or persons having the legal title to and the right to possession of——." The Supreme Court of South Carolina in construing the effect of this statutory provision has held that the payment of taxes is, under such statute, evidence of title and of the right to possession of land.

> "When we come to the return for taxation being made in the name of James Stuart, it seems to me we have very strong circumstance to support his claim,—I find it sufficient proof of adverse possession and of a grant." *Campbell* v. *Stuart, et al.*, 84 S. E. 415, 100 S. C. 144.

The defendant's failure to pay taxes on the disputed property was also evidence that the defendant did not claim the disputed property. (*Gadsden* v. *West Shore Investment Company*, 99 S. C. 172, 82 S. E. 1052-1053.) The Court of Appeals, after reweighing this testimony, ignored the Rule of the South Carolina Supreme Court and held erroneously as follows: "It is most unfortunate that the system of keeping the land records for taxation in this region was such that it is almost entirely impossible to

determine with any measure of certainty, just what parcel or parcels of land were covered by a particular tax payment.—In such a state of the records it does not appear that material reliance by either party upon payment of taxes is really justifiable." (153 F. (2d) page 580, R. 145.) The plaintiff's record of taxation was clear and it was only the defendant's attempt to show some payment of taxes from 1936 to 1941 that was confused.

The Court of Appeals was so prone to reweigh the evidence against the plaintiff that it held in its opinion: "It may be noted that plaintiff's deed from his mother, contrary to almost universal practice, makes no mention whatsoever of the source of his grantor's title" (R. 141), and placed this as evidence on the scales against the plaintiff by inferring that the non-existence of such a recital proved the mother had no title to the disputed property. Not only does the record fail to indicate any such inference, but the universal practice in land matters in South Carolina is not to include the source of title.

Plaintiff submits that the action of the Circuit Court of Appeals was not a lawful analysis of the testimony to determine whether or not a verdict should have been directed for the defendant on the grounds that there were no controverted issues of fact upon which a reasonable man could differ as to the defendant's proof of superior title, as is authorized under Rule 50-B of the Rules of Civil Procedure, but, on the contrary, the appellate court's opinion obviously reveals its usurpation of the function of the jury, contrary to the Seventh Amendment of the Constitution of the United States, in that it vacated the judgment after testing its own credibility of the witnesses and the weight of evidence of the fact of possession, and came to the conclusion, "It is difficult to see that the defendant could have done much more to assert its possession", and reversed the judgment

and verdict of the plaintiff and entered judgment for the defendant on the ground of superior possession, which grounds were not laid by the motion for directed verdict and that such action is not authorized by Rule 50-B.

II

The action of the Circuit Court of Appeals in reversing the verdict and judgment of the plaintiff and gratuitously entering judgment for the defendant is contrary to and in violation of Rule 61 of the Rules of Civil Procedure.

> "Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The rule undoubtedly must be read in conjunction with the Seventh Amendment of the Constitution of the United States and Rule 38 of the Rules of Civil Procedure. The purpose of this Rule and the statutes with which it conformed was designed to prevent usurpation of the power and function of the jury to determine facts and issues based on the excuse of procedure permitting determination of legal questions arising from the trial of a case. In arriving at a determination of whether or not the verdict and judgment of the plaintiff in the district court should be reversed, the appellate court was bound to make a finding that failure to set aside the verdict and judgment would have been inconsistent with substantial justice. "Substan-

tial justice" is defined in Words and Phrases, Volume 40, page 503, as follows: "Substantial Justice means a fair trial to each of the parties."

A. It, therefore, becomes necessary to analyze the evidence introduced at the trial and the procedural actions at trial to determine whether or not a fair trial was had in the Circuit Court. A close analysis of the opinion of the Court of Appeals makes no mention that failure to set aside the verdict and judgment would be inconsistent with substantial justice. The only basis upon which the Appellate Court apparently placed its right to reweigh the evidence relates to the introduction by the plaintiff of a deed from his grandfather to his father and the plat of the grandfather of 1847. The appellate court stated: "It may be interjected here that harmful error unquestionably took place in the admission of, and failure to take from the jury, testimony with respect to the plaintiff's purported chain of title prior to the deed from his mother to him." (R. 141, 153 F. (2d) page 578.)

The Virginia Code of Civil Procedure, Section 6331, of 1919, contains a mandate similarly worded to Rule 61 of the Rules of Civil Procedure. This provision including the definition of the term Substantial Justice, was construed by the Supreme Court of Appeals of Virginia as follows:

> "The revisors in Section 631 of the Code of 1919 in keeping with the modern trend of legislative and judicial policy, added a new clause to the old section and the statute now provides that—
>
> 'No judgment or decree shall be reversed . . . for any error committed on the trial were it plainly appears from the record and from the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been done.'

"It is our purpose to vitalize this provision in its application and administration. Of course, there will always be room for doubt as to whether the right result has been reached when the evidence has been in serious conflict; but in causes triable and tried by juries 'Substantial Justice' in a legal sense has been attained when litigants have had one fair trial on the merits, and although instruction No. 3 was open to the criticism which we have discussed, it could not have reasonably misled the jury, and we hold that the error does not warrant a reversal." (*Virginia Ry and Power Co.* v. *Smith and Hicks*, 105 S. E. 532, at page 535, 129 Va. 269.) It is the contention of the plaintiff in this case that the defendant had a fair trial and substantial justice was done, and no error was committed that could have reasonably misled the jury.

Section 378 of the Code of Laws of South Carolina of 1942 provides as follows:

"Whenever it shall appear that the occupant or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree of judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises under such claim for ten years, the premises so included shall be deemed to have been held adversely;—"

Section 379, immediately following the above provision, states:

"For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, the land shall be deemed to have been possessed and occupied in the following cases: (3) Where although not enclosed it has been used for the supply of fuel or of

fencing timber, for the purposes of husbandry or the ordinary use of the occupant."

The plaintiff, relying on the above statutes and the decisions of the Supreme Court of South Carolina, and in particular *Macedonia Baptist Church* v. *City of Columbia* (10 S. E. (2d) 350, 195 S. C. 59) introduced in evidence his deed from his mother which had been on record for more than twenty years, to-wit: from August 16, 1920, to September, 1941, when the trespass was committed, and to June 22, 1945, when the case was tried. He testified he entered into possession of the tract under this deed and he had paid taxes on the property since 1921; that he hunted on the property, got wood on it, clapboards, covering for barns and houses and two and three foot boards (R. 3-4). He then was asked if he had a deed from his father to his mother for the disputed tract of land, to which he replied he did not have such a deed (R. 5). He was then asked if his mother was in possession. He was then asked if his father was in possession of the property prior to 1917, and replied that he had been in possession from about 1888 (R. 5). He then introduced deed from A. Miles Cone to Miles Cone dated December 19, 1888, and plat by T. P. Cooper, Surveyor, dated January 15, 1847, showing the lands of the grandfather, A. Miles Cone. Although this deed and plat of the grandfather to the father were objected to by the defendant, it notified the plaintiff prior to trial that it would introduce these identical deed and plat and later in the trial, waived its objection to the deed and this plat and actually introduced the identical deed and plat as part of the defendant's exhibits, the deed being shown as defendant's exhibit No. D-13 (R. 68), and the plat with the same exhibit number (R. 71). The defendant thus could not be heard to complain that it did not have a fair trial because of the introduction of this deed and plat by the plaintiff when it in turn introduced this identical evidence.

Nor can the defendant claim the introduction of this deed and plat by the defense was motivated or compelled by the erroneous introduction by the plaintiff, since in accordance with pre-trial agreement, on May 18, 1945, the defendant served notice on the plaintiff's counsel that this very deed and plat would be introduced as part of the defendant's case. (See letter of Waring and Brockinton, attorneys for the defendant, shown on page R. 136, Item No. 1 in said letter.)

Under the *Macedonia* decision of the Supreme Court of South Carolina *(supra)* and section 378 and 379 of the South Carolina Code, the plaintiff was not required to introduce the deed from the grandfather to the father and the plat of the grandfather in his case in chief.

> "The important question is thus raised whether a plaintiff alleging both title and possession is entitled to recover damages upon proof of his possession and the invasion of it by the defendant, *without proving also that he has a perfect title.* The question must be answered in the affirmative. One person who finds another in possession of land cannot, by seizing the possession or invading it, put him whose possession he seized or invaded to proof of his title. In such a case possession is prima facie evidence of title and he who invades it must establish his title. If this were not so, a holder of land could be put to proof of title against the world by anyone who might choose to trespass or squat upon his lands. This conclusion is well supported by authority. When the plaintiff alleges an invasion of his possession this gives character to the action, as one in the nature of the old action of trespass quare clausum fregit. Couch *v.* Burke, 2 Hill Law 534; Connor *v.* Johnson, 59 S. C. 145, 37 S. E. 240." *Beaufort Land & Investment Company v. New River Lumber Company*, 68 S. E. 637, page 638, 86 S. C. 358.

> "This was error because this was an action of trespass *quare clausum fregit* in which form of action it was not legally encumbent upon the plaintiff to recover on

the strength of its title, but it was sufficient to make out plaintiff's case by merely showing possession on the part of the plaintiff." *Santee River Cypress Lumber Co.* v. *Elliot, et al.*, 150 S. E. 683, page 691, 153 S. C. 179.

"This is not an action to try title. It is one to recover damages for trespass to property of which the plaintiff was in possession. The deed which plaintiff produced was sufficient to show that the Church was in lawful possession of the property." *Macedonia Baptist Church* v. *City of Columbia*, 10 S. E. (2d) 350, 195 S. C. 59.

The introduction of this evidence was necessitated in anticipation of the defendant's introduction of such evidence and to explain that this deed and plat did include the land under dispute and, therefore, that the disputed land was a part of the tracts there shown and not a part of the Waring Plantation adjoining it, under which the defendant was going to claim. The oral testimony of the plaintiff and his brother, Owen Cone, that his mother, father and grandfather were in possession of the land as a part of the deeds and plats proposed to be introduced by the defendant, and the oral testimony of John D. Harrison (R. 105-6); Robert Williams (R. 108-9); Frank Green (R. 109-10); and Julia Anne Driggers (R. 110), were admissible to identify the disputed property as known in the community as Cone land, and not a part of Waring Plantation, under which the defendant claimed, and was not withheld until reply because the plaintiff was on notice that the defendant would introduce the deed and plat of the father and the grandfather.

It, therefore, is patently clear that since the introduction of the deed from the grandfather to the father and the plat of the grandfather was injected into the case by the defendant, it can not be said that the introduction of this evidence deprived the defendant of a fair trial, and, therefore, the failure by the District Court to direct a verdict on the

grounds of superior title in the defendant, was not a denial of or inconsistent with substantial justice, and the appellate court was without power to vacate the verdict and judgment. No motion *non obstante verdicto* was made.

The plaintiff introduced certificates from the records of Dorchester County that he had paid taxes on the disputed lands for more than twenty years and that his mother and father had paid taxes on the land thereon, and the payment of taxes for more than twenty years, coupled with the plaintiff's possession, presented fair issues of fact to go to the jury under a fair trial and refusal to direct verdict even on such grounds and take the case from the jury would not have been inconsistent with substantial justice.

> "The possession of the Bardins was adverse and continuous for more than 20 years; and while the land in question was not cultivated or inclosed, it was used for the supply of fuel and timber, the ordinary uses for which such land was fitted. Code Civ. Proc. 1902, paragraph 103."

> "The payment of taxes on the land for a number of years by the Bardins was also some evidence to be submitted to the jury on the ground whether the state had parted with title." *Bardin et al.* v. *Commercial Ins. & Trust Co.*, 64 S. E. 765, 82 S. C. 358.

B. Even if the rule of the Supreme Court of South Carolina was that the plaintiff had to prove perfect paper title, the action of the Circuit Court of Appeals in reversing verdict and judgment for the plaintiff, and entering judgment for the defendant, is in violation of Rule 61 because the Circuit Court of Appeals would only have been justified in sending the case back for a new trial by its own express opinion. The appellate court's opinion alleges that: "Specifically, we have already indicated our opinion that prejudicial error occurred in the admission of evidence with reference to the plaintiff's alleged predecessor in title. This

ground alone is sufficient to require a remand of the case for a new trial." (R. 146). It necessarily follows that if the introduction of the deed from the father to the grandfather and the plat of the grandfather were prejudicial (which is not true as shown above) so that the defendant was denied a fair trial, the Court of Appeals was limited to send the case back for a new trial by its own opinion.

In determining whether or not the defendant was denied a fair trial, it must be kept in mind that the plaintiff, in accordance with the rules of the Supreme Court of South Carolina, having introduced a deed and testimony of paper title and possession for more than twenty years, the burden of proving superior title as a defense was then cast upon the defendant.

> "Judge O'Neall, in a concurring opinion, said: 'When the plaintiff's possession, actual or constructive, is entered upon, I think such possession is evidence of title to put the defendant to prove his title.' In Connor *v.* Johnson, supra, the court held that the action was in the nature of trepass quare clausum fregit; that is, an action for the invasion of the possession of the plaintiff, where the complaint alleged the plaintiff to be in possession *under a paper title*, and that the defendant had trepassed, and the answer denied all the allegations, including, of course, the allegations of plaintiff's possession and his paper title, and set up title in defendant. In such an action it was held that it was only necessary for the plaintiff to show possession, and that for defendant to prevent a recovery, it was not sufficient to show that the plaintiff had no title, but that he must show title in himself." *Beaufort Land & Investment Company* v. *New River Lumber Company*, 68 S. E. 637, page 638, 86 S. C. 358.

The defendant did not carry this burden of evidence, but on the contrary, the evidence is uncontested that the disputed property was not a part of the lands purchased

by the defendant and was never claimed or occupied by the defendant's grantor.

The appellate court apparently, in determing whether or not the defendant had a fair trail, ignored this rule of the shift of the burden of evidence and after testing the credibility of the plaintiff's testimony and reweighing the evidence, came to the conclusion that the alleged erroneous introduction of the deed from the grandfather to the father and the plat of the father in the record should be stricken out and that the state of the record after striking out such alleged erroneous evidence deprived the plaintiff of a prima facie case. Although it has been previously shown that this view of a fair trial is erroneous, even if it were so, the action of the appellate court in entering judgment for the defendant deprives the plaintiff of his constitutional right to a new trial and the opportunity to present additional evidence to cure the alleged defect. It is the position of the plaintiff that even were the appellate court's interpretation of South Carolina Law correct, the plaintiff is entitled to a new trial wtihout the alleged erroneous evidence in the record.

The fafacy of the reasoning of the appellate court is apparent in that if the issue of fact presented to the jury was whether or not the disputed land was Cone land or a part of the Waring Plantation of the defendant, they have determined by their verdict that the land was a part of the Cone holdings, and not a part of the Waring Plantation. The only complaint then, of the plaintiff's *perfect* chain of title, would be a missing link between his father and his mother. It is patent that such a defect did not deny the defendant of a fair trail and such defect is a matter of form and not of substance. If the disputed land was a part of the Cone holdings, the plaintiff's witness, Owen Cone, testified in open court and it will be admitted by the defendant, is the present holder of the estate lands and

all the interest of Miles Cone, the father, and would be the present holder of the title of the disputed lands as a part of the father's and grandfather's. Such a defect of form can readily be cured by a quit claim deed from Owen Cone to his brother, the plaintiff. But the plaintiff submits that the said Owen Cone, having appeared in open court under oath, declaiming any interest in the disputed lands and acknowledging the ownership and title thereof to be in the plaintiff, it would be repugnant to substantial justice to send the case back for a new trial for the execution of a mere formal quit claim.

The plaintiff further submits that it would be inconsistent with substantial justice to send the case back for a new trial without correcting the erroneous law of the case as laid down by the Court of Appeals.

Conclusion

WHEREFORE, it is respectfully submitted that the above analysis of the facts of trial and evidence in the case and the applicable law can lead but to the conclusion:

1. That the Circuit Court of Appeals was in error in vacating the verdict and judgment of the plaintiff and entering judgment for the defendant since that court was restricted to an analysis of the weight of the evidence as to the proof of the defendant's title under Rule 50-B and was without authority to reweigh the evidence, test the credibility of the witnesses of its own volition as to the weight of the evidence of possession between the plaintiff and the defendant; and

2. The Circuit Court of Appeals was in error in vacating the verdict and judgment of the plaintiff and in entering judgment for the defendant contrary to the mandates of Rule 38 and Rule 61 and the Seventh Amendment of the

Constitution, since the defendant had a fair trial in the Circuit Court and the issue of title and possession were decided as questions of fact by the jury; and

3. If the above two propositions are not true, the Circuit Court of Appeals was in error in entering judgment for the defendant and in failing to remand the case for a new trial since only a procedural error in the introduction of evidence was complained of or found by the appellate court which would require a new trial.

The plaintiff submits that the verdict and judgment of the United States District Court for the Eastern District of South Carolina, Charleston Division, dated and filed April 1, 1946, pursuant to a mandate of the United States Circuit Court of Appeals, Fourth Circuit, dated and filed March 15, 1946, should be reversed and the verdict and judgment of the plaintiff, together with costs, be restored; or that said verdict and judgment for the defendant should be reversed and mandate issued by this Honorable Court for a new trial and that the costs of appeal be taxed against the defendant.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER CO.

BRIEF IN OPPOSITION TO CERTIORARI

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BRIEF IN OPPOSITION TO CERTIORARI

I

THE COURT BELOW CORRECTLY INTERPRETED AND APPLIED THE SOUTH CAROLINA DECISIONS

Respondent submits that the opinion below is not subject to any of the errors charged against it. On the contrary, the opinion is a composite, logical and correct statement of the several rules applicable to an action of trespass *quare clausum fregit* under the law of South Carolina. It will be welcomed and appreciated by the bench and bar

of South Carolina because it brings together so many of the pertinent rules and states them in a logical and understandable way.

The brief filed for petitioner quotes (on page 14) a portion of a sentence from the opinion below, and by adding a capital P, without asterisks, indicates that this is a complete sentence. A consideration of the complete sentence, and even of the complete paragraph in question, is a fairer test of the opinion. It is difficult to see, when the paragraph is read as a whole, how it could be more clearly stated that plaintiff's right to recover on the trial was based "upon the injury to his possession."

Petitioner's quotation (page 14 of brief) from *Macedonia Baptist Church v. City of Columbia,* 195 S. C., 59, 10 S. E. (2d), 350, should be considered in connection with the facts of the case and the issue to which the South Carolina Supreme Court was speaking. The court said: "This is an action to recover damages alleged to have been caused by surface waters drained from the streets of the City of Columbia, and cast upon certain real estate owned by respondent. * * *" The question to which the court was speaking was thus quoted: "IV. Was one isolated deed from an individual, dated in 1914, sufficient by itself to prove plaintiff's title to the property in question?"

The undisputed evidence showed that the plaintiff church had received a deed to the lot of land in the City of Columbia on June 14, 1914, and had then erected and had since maintained, occupied and used a church building thereon until the flooding on July 16, 1938. The trial judge held, in denying a motion for a new trial, that plaintiff had proved title (evidently) by proving actual and adverse possession of the lot under claim and color of title for a continuous period of more than twenty years prior to the dam-

age. (This proved title by presumption of a grant.) The City did not claim either possession or title in itself. It was on these facts, and to the quoted question, that the court spoke in the paragraph from which petitioner quotes only a part. (Head notes 6, 7, 8; 195 S. C., at 70, 10 S. E. (2d), at 355.) In other words, the court was there dealing with a case in which plaintiff had proved not only title, with constructive possession as an incident thereof, but also actual possession as of the time of the damage.

A reading of the complete paragraph of the opinion, with the above facts and question in mind, will dispel any suggestion of inconsistency therewith in the opinion below. In his quotation in the brief here petitioner has omitted the last clause of the last-quoted sentence, without indicating such omission. The omitted clause reads "and no one had offered to show any paramount title to it."

TITLE TO REAL ESTATE CANNOT BE PROVED BY PAROL

The petition and supporting brief charge the court below with making rulings that it did not make. Among these is the assertion (page 19) that the court ruled that parol testimony was inadmissible to prove possession of the 106.5-acre tract of land in question by plaintiff's mother, father and grandfather. The court below did not make such a ruling.

The record tends to confuse, because plaintiff was attempting to prove paper title, title by adverse possession for twenty years giving rise to the presumption of a grant, title by adverse possession for ten years, and actual possession as of the time of the alleged trespass in September, 1941, all at the same time. Plaintiff's theory as to his chain of title—which he first disclosed on the trial, to the

complete surprise of defendant—was that it went through his mother, back to his father and then back to his grandfather. Plaintiff introduced the deed from his mother dated and recorded in 1920, with the attached plat (R. 70). Plaintiff also introduced the deed from his grandfather to his father, dated and recorded in 1888, covering two tracts—one of 248 acres, plus another of 72 acres, making a total of 320 acres (R. 97). The link between plaintiff's father and mother was missing. Plaintiff was faced with two substantial difficulties in closing this link. First, was the persuasive, if not conclusive, evidence offered by defendant *contra* the identity of the two tracts of land, and, second, that there was no deed of record from plaintiff's father to his mother. It was in connection with plaintiff's effort to overcome the second difficulty, that plaintiff offered the parol testimony to prove that the title passed from his father to his mother, and that there was a deed from his father to his mother in 1917. This is the testimony that the court below held should have been excluded by the district court on defendant's objection and stricken on defendant's motion. Plaintiff testified in driblets at pages 5, 6, 7, 9 and 14; plaintiff's witness Harrison at page 28; and plaintiff's brother at page 37. The motions to strike are found at pages 57-58. The record became confusing, and patience was required to keep it straight. The learned trial judge became impatient and then confused.

Appellant's brief in the court below (pages 31-37) argued that the evidence was inadmissible because

(a) Title to real estate cannot be proved by parol, citing *Spence v. Spence*, 4 S. C. L. (2 Brev.), 460, 461; *Mayo v. R. R. Co.*, 40 S. C., 517, 519, 19 S. E., 73; *Metz v. Metz*, 48 S. C., 472, 488, 26 S. E., 7; *Luco v. United States*, 64 U. S. (23 How.), 515, last paragraph on 543, 16 L. Ed., 545,

last paragraph on 551; *Hayes v. United States*, 175 U. S., 248, 257, 44 L. Ed., 150, 154; and

(b) Parol evidence of a deed—particularly an unrecorded deed—was admissible only upon prior proof (1) of the existence of the deed, including the execution thereof, (2) that the deed had been lost or destroyed without plaintiff's fault, and (3) that an appropriate search had been made therefor, citing, amongst other cases, *Floyd v. Mintsey*, 39 S. C. L. (5 Rich. L.), 361, 373; *O'Neal v. Isbell*, 43 S. C. L. (9 Rich. L.), 367, 370; and *Uzzell v. Horne*, 71 S. C., 426, 431, 51 S. E., 253.

It was with these authorities before it that the court below held that this testimony was improperly admitted and retained in the case, although the court evidently did not think it necessary to cite authority to support such elementary propositions [page 4 of printed opinion; 153 F. (2d), 578 (4)].

Defendant made a motion for new trial on after-discovered evidence in the district court and submitted therewith copies of two instruments from the registry office for Dorchester County certified by the clerk of court. The first was a mortgage from plaintiff's father to one J. H. Cone, dated and recorded in 1928, and the second was a deed from plaintiff's father to one Owen C. Cone, dated and recorded in 1932. Both instruments covered all the land conveyed to plaintiff's father by the deed of plaintiff's grandfather in 1888, carried a covenant of general warranty by plaintiff's father, and the deed was a conveyance in fee simple (R. 114, 120).

The court below did not find it necessary to pass on the denial of this motion [page 10, printed opinion; 153 F. (2d), 581 (11, 12)], but respondent submits on the gen-

eral view of the case that this record evidence is conclusive that plaintiff's father did not execute a deed to plaintiff's mother in 1917, or at any other time, covering a portion of the land conveyed to plaintiff's father by the deed from plaintiff's grandfather in 1888.

DEFENDANT WAS ENTITLED TO JUDGMENT ON THE EVIDENCE

An analytical consideration of the evidence in the record will, it is submitted, convince any court that plaintiff utterly failed to prove either constructive possession based on title, or actual possession at the time of the alleged trespass, and that, in addition thereto, the entire evidence admits only of the reasonable inference that defendant has been in actual possession from the date of its entry under its deed in 1924.

Under the substantive rule recently restated in *Littleton v. Roberts*, 181 S. C., 303, 187 S. E., 349, and therein applied (by a similar direction for entry of judgment in favor of defendant in the trial court), as well as under the other South Carolina cases cited in the opinion, there was no other course for the court below to pursue, since the opinion shows that it viewed plaintiff's proof as charitably as possible. The following quotation from *Ætna Casualty & S. Co. v. Yeatts*, decided August 22, 1941, 122 F. (2d), 350, 352, indicates that the court below knew the proper test:

> "* * *; for it is too well settled to warrant discussion that, on such motion, the evidence must be taken in the light most favorable to the party against whom the directed verdict is asked and that all conflicts must be resolved in his favor. * * *"

AS TO RES ADJUDICATA

The petition asserts (page 5) "that the entry of judgment for defendant, through the medium of *res adjudicata*, forever declared title to the disputed lands in the defendant * * *." This is again asserted on page 6 and again in the brief (page 24). Petitioner need have no such fear.

In *Littleton v. Roberts, supra*, the Supreme Court of South Carolina said:

> "This is not an action to try title, nor is it an action to recover possession of real estate.
>
> "Admittedly it is an action in trespass *quare clausum fregit.* * * *" (181 S. C., 305, 187 S. E., 350.)

Again:

> "It is not to be understood that anything contained in this opinion has any bearing on plaintiff's right to bring her action in another form, if she be so advised. We hold simply that the action may not be maintained in this form.
>
> "The judgment is reversed, and the case is remanded, with instruction to enter judgment for defendant under Rule 27." (181 S. C., 310, 187 S. E., 352.)

The doctrine of *res adjudicata* does not apply in South Carolina to actions for recovery of real estate or possession thereof at common law. By the Act of 1879 (now section 374 (2) of the Code of 1942), "plaintiff in all actions for recovery of real property, or the recovery of the possession thereof," is limited to two actions, with a proviso that the costs of the first be paid and that the second be brought within two years. (Quoted in Appendix E.) See *Carr v. Mouzon*, 93 S. C., 161, 76 S. E., 201.

II

THE GROUNDS OF THE MOTION WERE SUFFICIENTLY STATED UNDER RULE 50(a)

Petitioner (page 20 of brief) quotes only a portion of the motion for a directed verdict (R. 58), and then asserts that "The grounds for directed verdict moved by the defendant were not based on superior possession of the defendant, but on superior title."

The motion to direct a verdict was really a continuation of the motion to dismiss, made at the conclusion of plaintiff's testimony, both as to the grounds thereof and as to the argument thereon. Defendant in its testimony had proved its deed in 1924 and actual and continuous possession of the land in question from that date down to the trespass in 1941, so that there was additional testimony before the court, when the motion to direct a verdict was made, going to disprove plaintiff's claim of either title or possession. This was affirmative evidence tending to show title and possession in defendant and thereby negativing either title or possession in plaintiff at the time of the trespass.

The grounds of the motion to dismiss are quoted (R. 56) as follows:

1. The plaintiff has failed to prove that he has title to the property.

2. The plaintiff has failed to prove that he had possession of the property at the time of the alleged trespass.

3. That the plainfiff has failed to prove that the defendant, in September, 1941, cut, removed and sold the timber alleged to have been cut.

The trial judge, after disposing of the third ground (which is not pertinent here), said (R. 57):

"I don't think the plaintiff has put up very strong possession testimony but he said he had been on and off the property for a great many years.

"(After further argument by Mr. Waring on the three grounds.)

"I shall refuse the motion."

When we come to the motion for a directed verdict (R. 58), we find the stenographic transcript to be sketchy; apparently defendant's attorney made some remarks which the stenographer omitted and others which she summarized. The motion was made in sections, because the trial judge interrupted counsel, from time to time, to express his views as to the effect of the testimony.

After stating the general ground of the motion, defendant's attorney said "The motion is based somewhat on the same argument that was presented to your Honor on the motion to dismiss," and then went on to assert, first, that defendant's proof substantiated title in defendant and not in plaintiff. There was further argument following this assertion which was not taken down by the stenographer. The trial judge then interposed remarks *in re* the effect of plaintiff's testimony, as to both possession and title (at bottom of page 58), and, following a statement by counsel, the trial judge recalled that plaintiff "said he went on there and cut some boards and hunted," etc. Thereupon defendant's attorney argued "as to showing of possession of this property in September, 1941" (R. 59). The trial judge replied that plaintiff "doesn't have to show possession that month;" then discussed defendant's evidence of possession, and ended with a reference to plaintiff's argument that defendant's evidence showed a mere illegal entry and

not possession (R. 59). Following this colloquy, the motion for directed verdict was completed by defendant's attorney by reference to the third ground of the motion to dismiss, which is not pertinent here. Following this, the trial judge made his ruling on the motion, to wit (R. 60):

> "THE COURT: I passed on the proposition yesterday. If I was wrong yesterday I am wrong today. I think this is a jury question. I am not going to discuss how strong or how weak it may be, it is not necessary for me to do that. It is an issue of fact. Motion refused. I assume Mr. Waring notes an exception."

The test whether a motion for a directed verdict states the specific ground therefor within the meaning of Rule 50(a) is well stated in *Virginia Carolina T. & W. Co. v. Dunbar* (C. C. A. 4th), 106 F. (2d), 383, 385: "* * * And we think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions by rule 50(b), as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. * * *"

This statement was quoted with approval and this test followed in *Ryan Distr. Co. v. Caley* (C. C. A. 3rd), decided January 17, 1945, 147 F. (2d), 138, 140, and the court added: "The basis of the motion was perfectly clear to both court and parties both in the trial court and upon this appeal."

The district court and opposing counsel both understood that the motion to direct renewed the grounds of the motion to dismiss, to wit, that plaintiff had failed to prove either title or possession as of the time of the trespass. Opposing counsel below voiced no request for amplification or clarification of the grounds of the motion, or of the reasons upon which the motion was refused, and, having failed to speak then and there, should not be heard to complain here.

THE CIRCUIT COURT OF APPEALS HAD POWER TO DIRECT ENTRY OF JUDGMENT UNDER RULE 50(b) NOTWITHSTANDING THAT DEFENDANT HAD MADE NO MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

The opinion below cites an article by Judge Dobie, "The Revision of the Federal Rules of Civil Procedure," 30 Va. L. Rev., 513, 520, dated September, 1944. The portion of the article relating to Rule 50(b) is printed as Appendix A hereto.

The opinion below also cites *United States v. Halliday* (C. C. A. 4th), 116 F. (2d), 812, 815, reversed on other grounds, 315 U. S., 94, 86 L. Ed., 711—opinion by Judge Dobie, wherein he quotes the remarks of Hon. Wm. D. Mitchell, Chairman of the Advisory Committee for this Court, of which Judge Dobie was a member, as follows: "We do not by this rule make it necessary for the trial court even to say, 'I am reserving the question of law.' That is a form anyway, and we make it safe in all cases by the device of prescribing that wherever he refuses to grant a motion for directed verdict he is deemed to reserve the question of law, taking the verdict subject to his later determination, and consequently may on motion after-

wards set aside the verdict, grant judgment notwithstanding, and the Circuit Court of Appeals may take the same action."

This Court has said that it may consider the meaning of the Rules, "But in ascertaining their meaning the construction given to them by the Committee is of weight." *Mississippi Pub. Corporation v. Murphree*, decided January 2, 1946, —— U. S.; ——, 90 L. Ed., 207, 210.

United States v. Wimbish (C. C. A. 4th), 154 F. (2d), 773—opinion also by Judge Dobie—is another illustration of the interpretation and application of Rule 50(b) by the court below. The status of the record there persuaded the court that there should be a new trial because the district court had not reached a decision on the many disputed questions of fact involved in the case.

Since the opinion of this Court came down in *Halliday v. United States*, on January 19, 1942, 315 U. S., 94, 95, 86 L. Ed., 711, 716, wherein *Berry v. United States* and *Conway v. O'Brien* were referred to, *certiorari* was denied on April 27, 1942, in *Howard Univ. v. Cassell* (C. C. A. D. C.), 126 F. (2d), 6; and a rehearing therein was denied May 25, 1942. 316 U. S., 675, 86 L. Ed., 1749.

The only case exactly in point that respondent finds since then is *Lowden v. Belt* (C. C. A. 8th), decided October 11, 1943, 138 F. (2d), 558. This is entirely in line with the opinion below.

Montgomery Ward & Co. v. Duncan, 311 U. S., 243; 85 L. Ed., 147, dealt with various phases of Rule 50(b), but not the exact point here involved. Appended to that case in 85 L. Ed., is an extensive note as to Rule 50(b), the pertinent section of which is found under the heading "g. Necessity of motion for judgment." (page 166), which col-

lects the cases to that time; but the author cites none that is not referred to herein.

AS TO THE PRACTICE IN SOUTH CAROLINA

The result in this case would have been the same if it had been tried in the courts of South Carolina—that is to say, the Supreme Court, having reversed the trial court for denying defendant's motion to direct a verdict in its favor, would have remanded the case for entry of judgment in favor of defendant under its Rule 27. (This rule has been in effect almost forty years, with some changes not material here; it is printed as Appendix B hereto.)

This is the course followed by the Supreme Court of South Carolina in *Littleton v. Roberts, supra,* 181 S. C., 303, 187 S. E., 349. In its consideration of the substantive law the court below properly found this case to be directly in point and conclusive on this phase of the evidence (page 11 printed opinion; 153 F. (2d), 581 (11, 12)).

Prior to 1942, the Circuit Court, which is the trial court in South Carolina, had only the right to grant a new trial, or a new trial *nisi,* following the verdict of a jury, although the court had refused a motion for a directed verdict made during the trial. The trial judges had come to think that when a motion to direct a verdict was made, the trial judge should have the power to reserve decision thereon, submit the case to the jury, and, following the verdict, call up the motion for a directed verdict for decision; and, in the event that the same was granted, set aside the verdict and enter judgment for the moving party. Following the decision of this court in *Baltimore & Co. Line v. Redman,* 295 U. S., 654, 79 L. Ed., 1636, some of the trial judges commenced to follow this practice. The Supreme Court, however, frowned thereon, taking the view that both parties were en-

titled to a decision of the motion as and when made and that the jury might be influenced by the reservation of decision. *Clardy v. Sovereign Camp,* 193 S. C., 444, 446, 8 S. E. (2d), 748; *Phillips v. Western Union Tel. Co.,* 194 S. C., 317, 321, 9 S. E. (2d), 736. (Both these cases happen to be additional illustrations of the usual direction for entry of judgment given by the Supreme Court under its Rule 27. See 193 S. C., at 456, and 194 S. C., at 327.) The circuit judges, however, persisted in their view, and at a conference of the judges of both courts, held pursuant to the section now 904 of the Code of 1942 (quoted in Appendix C), Circuit Court Rule 79 was adopted in 1942 (quoted in Appendix D).

This history seems to make it clear that the rule allowing a motion for judgment *non obstante veredicto* was adopted to increase the power of the trial judge— that is, to allow him to reserve his decision on the motion for a directed verdict, and to decide and make this effective later, as justice might require.

The adoption of Circuit Court Rule 79 did not have, and has not had, the slightest effect on the power of the Supreme Court of South Carolina to act under its Rule 27. Since the adoption of Rule 79 in 1942, the power of the Supreme Court under its Rule 27 has been the same as it was before. It is immaterial to the jurisdiction of the Supreme Court under its Rule 27 whether the appealing party made or failed to make a motion for judgment *non obstante veredicto* in the trial court, provided that he duly made a motion for a directed verdict at the appropriate time during the trial. *Bell v. A. C. L. R. Co.,* decided February 2, 1943, 202 S. C., 160, 176—note that the concurring opinion of Judge Fishburne (page 176) is the opinion of the court; 24 S. E. (2d), 177.

This is persuasive that the construction given Rule 50(b) by the court below was correct. The portion of the rule allowing a motion for judgment *non obstante veredicto* was not made to affect the power of the appellate court; that power is complete when the motion for a directed verdict is made under Rule 50(a) and the decision reserved thereon by the first sentence of Rule 50(b). The remainder of Rule 50(b) affects only the power of the district judge; nothing more is needed to complete the power of the appellate court.

In *Berry v. United States, supra,* 312 U. S., 450, 452, 85 L. Ed., 945, 947, this Court suggested that the Circuit Court of Appeals were not then in complete agreement; and the reference note cites three cases. Of these, *Conway v. O'Brien* and *United States v. Halliday* have been already referred to. The third case is *Pruitt v. Hardware Dealers Mut. F. Ins. Co.* (C. C. A. 5th), 112 F. (2d), 140. That case does not seem to be inconsistent with the particular phase of Rule 50(b), making the specific question thereunder, that arises here and is discussed in the cases cited herein. Another opinion of the court below [*Etna Cas. & S. Co. v. Yeatts,* decided August 22, 1941, 122 F. (2d), 350] might be read in this connection. It emphasizes the distinction between the exact point decided in the *Pruitt case* and the point involved here.

Counsel for respondent respectfully submit that the exact phase of Rule 50(b) here involved has been correctly and uniformly construed and applied by all the Circuit

Court of Appeals and that there is no reason for this Court to grant *certiorari*.

Respectfully submitted,

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APPENDIX A

QUOTED FROM AN ARTICLE ENTITLED "THE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE," BY HON. ARMISTEAD M. DOBIE, IN 30 VIRGINIA LAW REVIEW, PAGE 513, COMMENCING AT PAGE 520

Rule 50. Motion for a Directed Verdict; (and for Judgment).

The words in parentheses are added to the old title of this rule. A number of deletions and additions have been made to subdivision (b), and the title of this subdivision has been changed from "Reservation of Decision on Motion" to "Motion for Judgment." Indeed, this subdivision has been completely rewritten to accomplish three purposes.

The amended rule clearly recognizes the power of the District Court to enter a judgment notwithstanding a verdict of a jury (or even, when the jury cannot agree, there has been *no* verdict), under a previous motion for the direction of a verdict. The awkard fiction of *Baltimore & Carolina Line v. Redman*,[7] is frankly eliminated. This case whipped the devil around the stump in order to minimize the evil effect of the Supreme Court's unfortunate decision in *Slocum v. New York Life Insurance Co.*[8]

Secondly, the amended rule permits an appellate court to order a final judgment (instead of granting a new and futile trial) in accordance with a motion in the trial court for a directed verdict, though no motion (after the verdict) was made in the trial court for judgment notwithstanding the verdict. While careful lawyers will always, in such cases, make a motion for judgment *non obstante veredicto*,

[7] 295 U. S. 654 (1935).

[8] 228 U. S. 364 (1913). This decision has been bitterly criticised by a host of writers and scholars.

this writer believes the amendment here accomplishes an altogether desirable purpose.[9]

Finally, a new paragraph is added at the end of this subdivision which reads: "A motion for a new trial, in the alternative, may be joined with a motion for judgment and the court shall dispose of the alternative motion for a new trial when ruling on the motion for judgment. If the motion for judgment is granted by the district court, its contemporaneous ruling on the motion for new trial is effective only in the event that the judgment is reversed and the case is remanded by the appellate court for further proceedings." The first sentence of this paragraph incorporates the decision of the Supreme Court in *Montgomery, Ward & Co. v. Duncan*[10] as to the proper practice here. The second added sentence avoids the unfortunate situation involved in *County of Allegheny v. Maryland Casualty Co.*,[11] and adopts the practice followed in *McIlvaine Patent Corporation v. Walgreen*.[12]

APPENDIX B

RULE 27 OF THE SUPREME COURT OF SOUTH CAROLINA, QUOTED FROM VOLUME I, CODE OF LAWS OF SOUTH CAROLINA 1942, PAGE 1446

When an appeal is sustained on the ground that a nonsuit should have been granted because of a failure of evidence, or because the evidence is susceptible of but one inference, the reversal of the judgment shall have the same

---

[9] Some federal appellate courts have held that this power existed under the old rule. *Conway v. O'Brien*, 111 F. (2d), 611 (C. C. A. 2d, 1940), reversed on other grounds, 312 U. S., 492 (1941); *Berry v. United States*, 111 F. (2d), 615 (C. C. A. 2d, 1940), reversed on other grounds, 312 U. S., 450 (1941); *United States v. Halliday*, 116 F. (2d), 812 (C. C. A. 4th, 1941), reversed on other grounds, 315 U. S., 94 (1942); *Howard University v. Cassell*, 126 F. (2d), 6 (App. D. C., 1941), cert. denied, 316 U. S., 675 (1942); *Lowden v. Bell*, 138 F. (2d), 558 (C. C. A. 8th, 1943). The Supreme Court has gracefully sidestepped this question. The author of this article wrote the opinion in *United States v. Halliday, supra*.

[10] 311 U. S. 243 (1940).

[11] 132 F. (2d), 894 (C. C. A. 3d, 1943).

[12] 138 F. (2d), 177 (C. C. A. 7th, 1943).

effect as if the nonsuit had been ordered, except when the cause of action will be barred by the statute of limitations before a new action can be brought; and when an appeal is sustained on the ground that a verdict should have been directed, the reversal of the judgment shall have the same effect as if a verdict had been returned by the jury under the direction of the court; but this court will not sustain an appeal from the refusal to direct a verdict, when, under all the circumstances, a nonsuit would have been the appropriate remedy.

APPENDIX C

SECTION 904, QUOTED FROM VOLUME I, CODE OF LAWS OF SOUTH CAROLINA 1942, PAGE 648

Judges to meet and make general rules.—The justices of the Supreme Court and the judges of the circuit courts shall meet in general convention on such day and at such place as may be designated by the Chief Justice, at least once in every two years, counting from the year of our Lord one thousand eight hundred and eighty-two, for the purpose of revising and amending the rules of the circuit court, and establishing such additional rules as may be deemed necessary to regulate the practice in the circuit courts; provided, such alterations or additions be not inconsistent with any of the statutes of this State; provided, further, that said judges shall cause to be transmitted to all the clerks of the circuit courts of this State copies of all rules amended and revised, and of all new rules made by them, within ten days from such amendment, revision or adoption.

APPENDIX D

RULE 79 OF THE CIRCUIT COURT OF SOUTH CAROLINA, QUOTED FROM VOLUME I, CODE OF LAWS OF SOUTH CAROLINA 1942, PAGE 1428

Motion *non obstante veredicto*—motion for new trial.—Whenever a motion for a directed verdict, made by

either party at the close of all the evidence, is denied, or for any reason is not granted, the trial court may, after verdict, upon motion made therefor, order judgment to be entered notwithstanding the verdict in favor of the party who was entitled to have a verdict directed in his or its favor. Such motion *non obstante veredicto* must be made after the reception of the verdict, and before the adjournment of the court in which the case was tried. A motion for a new trial may be joined with the motion *non obstante veredicto*, or a new trial may be prayed for in the alternative.

APPENDIX E

SECTION 374 (2), QUOTED FROM VOLUME I, CODE OF LAWS OF SOUTH CAROLINA 1942, PAGE 207

(2) The plaintiff in all actions for recovery of real property, or the recovery of the possession thereof, is hereby limited to two actions for the same, and no more; provided, that the costs of the first action be first paid, and the second action be brought within two years from the rendition of the verdict or judgment in the first action, or from the granting of a nonsuit or discontinuance therein.

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BRIEF FOR RESPONDENT

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR RESPONDENT

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY

The questions presented are limited to Rules of Civil Procedure 50(a), 50(b), 38 and 61.

The order granting *certiorari* is "limited to the questions of federal procedure raised by the petition for the writ" (R. 150).

The construction of this limitation by counsel for respondent is expressed in the reservation which they inserted in the stipulation covering the printing of the record (R. 151).

Counsel for respondent submit that there are only three questions for consideration by this Court, to wit:

I. Were the grounds of the motion to direct a verdict sufficiently stated under Rule 50(a)?

II. Did the Circuit Court of Appeals have the power to direct entry of judgment in favor of defendant under Rule 50(b), notwithstanding that defendant had made no motion for judgment *non obstante veredicto?*

III. What effect, if any, have Rules of Civil Procedure 38 and 61 on this case?

Counsel recognize, however, that the extent of the review is a question for the Court's own determination, and, therefore, add to this brief some comment in answer to the argument going to the merits that constitutes the brief for petitioner.

This additional argument in behalf of respondent is found under the question stated as follows:

IV. Was there error below going to the merits?

If respondent's view as to the limit of the review is sustained, Question IV may be entirely disregarded.

STATEMENT OF THE CASE

Counsel for respondent desire to question the accuracy of a number of assertions that appear in the brief for petitioner—in particular, some relating to the existence and effect of the evidence in the record. But respondent's counsel are convinced that the limitation in the order granting the writ excludes from review all questions relating to the sufficiency of the evidence and rulings in respect of the admission thereof. Counsel crave indulgence, therefore, to first present their Questions I, II and III and to discuss all questions going to the merits under their Question IV.

Counsel for respondent submit that the opinion below carries a comprehensive statement of the case leading up to the questions that will be reviewed by this Court.

ARGUMENT

I

Were the grounds of the motion to direct a verdict sufficiently stated under Rule 50(a)?

The contention of opposing counsel is presented on page 10 of their printed brief, from which the following portion of a paragraph is quoted:

> "* * * The defendant's motion is quoted at R. 42, and applying Rule 50(a) of the Rules of Civil Procedure, the specific grounds of the defendant's motion were 'The proof deduced by the defendant, we feel substantiates title conclusively in this land in the defendant, not in the plaintiff, as he attempted to show.' The defendant's motion did not give as grounds that the defendant had under all the evidence proved superior possession. * * *"

The question presented here centers on the last sentence of Rule 50(a), which reads: "A motion for a directed verdict shall state the specific grounds therefor."

The quotation made above and stated by petitioner's counsel to constitute the "specific grounds of the defendant's motion" was only one sentence out of a paragraph containing three sentences (R. 42-43). Further, the paragraph quoted from was only one paragraph out of six devoted to the statement and argument of the motion and the incidental colloquy with the trial judge. These together comprise more than a page of the printed record (R. 42-44).

Preceding the sentence quoted by petitioner, defendant's counsel had commenced the motion in this language:

"* * * If your Honor please, our motion is for a direction of verdict on the ground that there can be but one reasonable conclusion from the evidence and that is that the judgment should be for the defendant. The motion is based somewhat on the same argument that was presented to your Honor on the motion to dismiss. * * *" (R. 42-43.)

The motion to direct a verdict was in effect a renewal of the motion to dismiss which had been made at the conclusion of plaintiff's testimony, both as to the grounds thereof and, in part, as to the argument thereon (R. 41-42). Defendant in its testimony had proved its deed in 1924 and actual and continuous possession by defendant of the land in question from that date down to the alleged trespass in 1941, so that there was this subsequent and additional testimony before the court, when the motion to direct a verdict was made, going to disprove plaintiff's claim of either title or possession. This was affirmative evidence tending to show title and possession in defendant and thereby negativing either title or possession in plaintiff at the time of the trespass.

The grounds of the previous motion to dismiss are quoted (R. 41) as follows:

"1. The plaintiff has failed to prove that he has title to the property.

"2. The plaintiff has failed to prove that he had possession of the property at the time of the alleged trespass.

"3. That the plaintiff has failed to prove that the defendant, in September, 1941, cut, removed and sold the timber alleged to have been cut."

The trial judge, after disposing of the third ground (which is not pertinent here), then said (R. 42):

"I don't think the plaintiff has put up very strong possession testimony but he said he had been on and off the property for a great many years.

"(After further argument by Mr. Waring on the three grounds):

"I shall refuse the motion."

The stenographic transcript of the motion for a directed verdict is sketchy; apparently defendant's attorney made some remarks which the stenographer omitted and others which she summarized. The motion was made in sections, because the trial judge interrupted counsel, from time to time, to express his views as to the effect of the testimony (R. 42-44).

After his first sentence, *supra*, defendant's attorney said "The motion is based somewhat on the same argument that was presented to your Honor on the motion to dismiss," and then went on to assert, first, that defendant's proof substantiated title in defendant and not in plaintiff (R. 43). There was further argument following this assertion which was not taken down by the stenographer. The trial judge then interposed remarks *in re* the effect of plaintiff's testimony, as to both possession and title (R. 43), and, following a statement by counsel, the trial judge recalled that plaintiff "said he went on there and cut some boards and hunted," etc. Thereupon defendant's attorney argued "as to showing of possession of this property in September, 1941" (R. 43). The trial judge replied that plaintiff "doesn't have to show possession that month"; then discussed defendant's evidence of possession, and ended with a reference to plaintiff's argument that defendant's evidence showed a mere illegal entry and not possession (R. 43). Following this colloquy, the motion for directed verdict was completed by defendant's attorney by reference to the third ground of the motion to dismiss,

which is not pertinent here. Following this, the trial judge made his ruling on the entire motion, to wit (R. 44):

> "The Court: I passed on the proposition yesterday. If I was wrong yesterday I am wrong today. I think this is a jury question. I am not going to discuss how strong or how weak it may be, it is not necessary for me to do that. It is an issue of fact. Motion refused. I assume Mr. Waring notes an exception."

In the face of this record, it is submitted that there is no basis for petitioner's contention.

The test whether a motion for a directed verdict states the specific ground therefor within the meaning of Rule 50(a) is well stated in *Virginia Carolina T. & W. Co. v. Dunbar* (C. C. A., 4th), 106 F. (2d), 383, 385: "* * * And we think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions by rule 50-(b), as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. * * *"

This statement was quoted with approval and this test followed in *Ryan Distr. Co. v. Caley* (C. C. A., 3rd), decided January 17, 1945, 147 F. (2), 138, 140, and the Court added: "The basis of the motion was perfectly clear to both Court and parties both in the trial court and upon this appeal."

Texas has adopted verbatim Rule 50(a) as Rule 268 of Texas Rules of Civil Procedure. The Court of Civil Ap-

peals of that State adopted this test in *Patrick v. McGaha* (1942), 164 S. W. (2), 236, and *Rudco Oil & Gas Co. v. Gulf Oil Co.* (1943), 169 S. W. (2), 791.

The propriety of considering both motions together in order to find the specific grounds required by Rule 50(a) is favorably considered in *Dawson v. McWilliams* (C. C. A., 5th, 1944), 146 F. (2), 38, 40. There defendants moved for a directed verdict at the close of plaintiff's evidence on the ground that the evidence "does not establish facts sufficient to create the cause of action in favor of the plaintiff * * * or to sustain a verdict in favor of the plaintiff * * *." At the close of all the evidence, the defendants moved the court peremptorily to instruct the jury to return a verdict in favor of defendants, stating no ground for this motion. Both motions were refused, and on appeal it was urged that the latter motion did not comply with Rule 50(a) because it did not state the specific ground therefor. The Court (at page 40) stated:

> "We think the two motions must be considered together; so considered, these motions do state the specific ground, namely, that the evidence does not establish facts sufficient to create a cause of action in favor of plaintiff or to sustain a verdict in favor of plaintiff."

The district court and opposing counsel below both understood that the motion to direct renewed the grounds of the motion to dismiss, to wit, that plaintiff had failed to prove either title or possession as of the time of the trespass. Opposing counsel below voiced no request for amplification or clarification of the grounds of the motion, or of the reasons upon which the motion was refused.

II

Did the Circuit Court of Appeals have the power to direct entry of judgment in favor of defendant under Rule 50(b), notwithstanding that defendant had made no motion for judgment *non obstante veredicto?*

As the basis for an intelligent and analytical discussion of the proper interpretation of Rule 50(b), it is necessary to consider the decisions which caused the rules committee to draft and propose the rule.

Slocum v. New York Life Ins. Co., 228 U. S., 364, 57 L. Ed., 879 (1913), a five-four decision, reversed the circuit court of appeals for directing a judgment notwithstanding the verdict as an infraction of the seventh amendment of the Federal Constitution and modified the judgment by substituting a direction for a new trial. It was fundamental in the reasoning that the appellate court by its action re-examined issues of fact, which the amendment expressly forbade, and that the common-law rule demanded that a new trial be ordered so that the right of trial by jury would be preserved.

In order to re-establish the trial judge's and appellate court's supervisory power, the federal courts resorted to the legal theory that where, on motion for a directed verdict at the close of all the evidence, questions of law, as distinguished from issues of fact, were expressly reserved by the court, the tribunal could *sua sponte* dismiss or direct judgment as might be appropriate.

This practice was approved in *Baltimore and Carolina Line v. Redman*, 295 U. S., 654, 79 L. Ed., 1636. The trial judge there had expressly reserved the question of law on a motion to dismiss on the ground that the evidence was insufficient to support a verdict for plaintiff, and, on a motion

for a directed verdict, on the same ground. Both motions were denied. The appellate court had reversed the judgment with a direction for a new trial. The Supreme Court held that the appellate court had erred and that its action should be modified by substituting a direction for judgment of dismissal on the merits. The *Slocum case* was distinguished on the ground that the motion for a directed verdict had been denied there without reservation of the question of the sufficiency of the evidence.

In the Redman opinion, the court referred to the well-established common-law practice of reserving questions of law arising during trial by jury and of taking the verdict subject to an ultimate ruling on such questions. It stated also that the reservation carried with it authority to make final disposition of the case as might be appropriate, such as entering judgment for one party, where the jury had found a verdict for the other, or making other essential adjustment. At page 660 it said:

> "Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course.
>
> * * * This court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant." (*Chinoweth v. Haskell*, 3 Pet., 92, 7 L. Ed., 614.)

Subsequent to these cases the Supreme Court decided *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 81 L. Ed. 1177 (1937). The lower court had failed to expressly reserve the

point of law after motion for directed verdict and plaintiff had later failed to move for judgment *non obstante veredicto*, as required by the state law (Pennsylvania). The Supreme Court reverted to the *Slocum case*, and modified the circuit court's direction to enter judgment for plaintiff by substituting an order for a new trial.

The Court said, incidentally, that since the plaintiff had failed to make the appropriate motion *non obstante veredicto*, as required by Pennsylvania law, the appellate court was without authority to direct entry of judgment for the plaintiff.

Apart from the effect of the *Slocum case*, Mr. Justice Butler's conclusion would have been the opposite if South Carolina procedure had been the controlling reference under the Conformity Act; that is to say, the Supreme Court of South Carolina under its Rule 27 (printed in Appendix B of respondent's brief in opp. to cert.) has express power to remand a case for entry of judgment after reversing the trial court for denying a motion to direct a verdict. This rule has been in effect for almost forty years and the practical application of it by the Supreme Court of South Carolina is illustrated by *Littleton v. Roberts*; 181 S. C., 303, 187 S. E., 349, a decision which the court below, in its consideration of the substantive law, properly found to be directly in point and conclusive on this phase of the evidence (R. 147, 153 F. (2), 581.) This case is later discussed herein under Question IV.

Although South Carolina Circuit Court Rule 79 (appendix C, brief in opp. to cert.) provides for a motion *non obstante veredicto*, it is immaterial to the power of the South Carolina Supreme Court under its Rule 27 whether the appealing party made or failed to make a motion for judgment notwithstanding the verdict in the trial court,

provided that he duly made a motion for a directed verdict at the appropriate time during the trial. *Bell v. A. C. L. R. Co.*, decided February 2, 1943, 202 S. C., 160, 176—note that the concurring opinion of Judge Fishburne (page 176) is the opinion of the court; 23 S. E. (2d), 177.

Since the adoption of Rule 50(b) this Court has granted *certiorari* in *Conway v. O'Brien*, 312 U. S., 492, 85 L. Ed., 969 (1941), *Berry v. United States*, 312 U. S., 450, 85 L. Ed., 945 (1941) and *Halliday v. United States*, 315 U. S., 94, 86 L. Ed., 711 (1942), all three of which involved the proper construction of the rule. In all three cases, however, the orders granting *certiorari* were unlimited; the Court reversed on other grounds and found it unnecessary to consider the procedural issue.

Rule 50(b) expressly and automatically reserves all questions of law for later determination by the court. It may properly be argued that the committee's purpose in so providing was to preclude the application of the *Slocum rule* where, through oversight, the trial judge failed to reserve. It may be argued further that the rule merely extends and crystallizes the practice approved in the *Redman case* and thus is a reaffirmation of the common-law rule, as stated in that opinion, pertaining to the existence of power in a federal court to reserve a question of law on proper motion, and after verdict *sua sponte* direct judgment for the movant. But basic in such an argument is the question: does Rule 50(b) modify the common law and the Redman rule by prescribing a condition precedent to the exercise of the same power by an appellate court, *i. e.*, the filing of a motion within ten days after verdict to set aside the verdict and enter judgment for the movant? Respondent answers the question in the negative. Respondent contends that the Court below correctly construed and applied Rule 50(b); that a motion for a directed verdict at the close of

all the evidence raises a question of law which is automatically reserved and remains in a suspended status, if denied or if neither denied nor granted, subject to the later determination of the appellate court. This contention has been sanctioned by all federal courts where the precise procedural circumstances of this case existed.

The second circuit has uniformly held that such is the proper interpretation. *Berry v. United States*, 111 F. (2), 615 (1940), 312 U. S., 450 (Rev. on other grds.); *Conway v. O'Brien*, 111 F. (2), 611 (1940), 312 U. S., 492 (Rev. on other grds.); *Limbershaft Sales Corp. v. A. G. Spalding and Bros.*, 111 F. (2), 675 (1940); *Fratta v. Grace Line, Inc.*, 139 F. (2), 743 (1943).

In the *Conway case*, Judge Learned Hand said at page 613:

> "* * * but Rule 50(b) provides that when such a motion is denied at the close of the evidence, the judge is to be 'deemed to have submitted the action to the jury subject to a later determination'; which is the equivalent of a reservation. It is not necessary that he should deny the motion once again; his failure to vacate his first order is enough. Hence, it is proper here to dismiss the complaint."

Judge Swan, in the *Limbershaft case*, said at page 678:

> "Finding error in the denial of the defendant's motion for a directed verdict, we must reverse the judgment. Since decision on the motion was reserved until after verdict, we may direct a judgment of dismissal on the merits. *Baltimore & Carolina Line v. Redman*, * * *. Even without such reservation this may be done under the new Rules of Civil Procedure, * * *."

The fourth circuit has similarly so adjudged. The most detailed discussion of the question is found in *United*

States v. Halliday, 116 F. (2), 812 (1941), 315 U. S., 94 (Rev. on other grds.), wherein Judge Dobie, with an identical procedural question before him, stated at page 815:

> "The denial of the original motion for a directed verdict, it seems, is now treated as the equivalent of a reservation by the District Court. Accordingly, we believe that the Government's failure to move in the court below for judgment in its favor notwithstanding the verdict does not restrict our power in the premises."

Then, after declaring that the court could find nothing in the rule that restricts the court's power to so direct, where orderly administration of justice so requires, he goes on to say at page 816:

> "And this seems none the less true, even though verdict of the judge (jury) was here in favor of the plaintiff, and even though here the defendant failed to file (as he is permitted under Rule 50(b) in the lower court a motion, after the verdict, 'to have the judgment entered in accordance with his motion for a directed verdict'."

In *Eastern Livestock Co-operative Marketing Ass'n, Inc., v. Dickenson*, 107 F. (2), 116 (1939), the same action was taken without discussion.

The Court of Appeals for the District of Columbia has also found such power in the appellate court. In *Howard University v. Cassell*, 126 F. (2), 6 (1941), (cert. den., 316 U. S., 675, rehearing den. 316 U. S., 711), again on the same exact procedural facts, the court said at page 12:

> "Here the defendant moved for a directed verdict on the ground of the statute of limitations at the close of the plaintiff's evidence and again at the close of all the evidence. The court denied the motions. After verdict, the defendant moved for a new trial but did not move within 10 days or at all to have the verdict

set aside and judgment entered in accordance with its motion for a directed verdict. However, the defense was not thereby waived, and the court's ruling may still be appealed from."

The Court then reversed and remanded with instructions to dismiss the complaint.

The eighth circuit, in *Lowden v. Bell*, 138 F. (2), 558 (1943), also finds this supervisory power in the appellate court, saying at page 560:

> "* * * Had the case been tried correctly, the appellants would have had a judgment in their favor determinative of the case. The fact that the appellants did not make a motion to set aside the verdict of the jury and for judgment notwithstanding the verdict, as they might have done under Rule 50(b), * * * does not preclude this Court from directing the trial court to enter the judgment to which the appellants were entitled under the evidence and the law. * * *"

The dictum at page 41, in *Atlantic Coast Line R. R. Co. v. Smith*, 135 F. (2), 40 (1943), indicates that the fifth circuit has also adopted respondent's view as to the proper construction of Rule 50(b):

> "* * *. The test of sufficiency of the evidence may be made on the trial and preserved for appeal purposes by timely motion for directed verdict * * *."

The tenth circuit is in accord; *Western Union Tel. Co. v. Dismang*, 106 F. (2), 362 (1939).

These cases are the only ones that counsel for respondent have found where the procedural facts are precisely those presented in this case.

It seems proper to assert that, in this exact situation, the circuit courts have consistently held that Rule 50(b) automatically reserves all questions of law raised by a mo-

tion to direct and vests in the trial and appellate court power *sua sponte* to direct judgment for the movant, where justice so requires. The privilege to make a motion subsequent to verdict goes only to the movant's procedural rights. While the courts did not find it necessary in the cases cited to discuss this provision of the rule, their conclusion as to power, regardless of whether a post trial motion is made, is consistent with the decisions of this Court and the language of the rule itself.

It can be stated unequivocably that the district court has power to direct a verdict on issues of law. Mr. Chief Justice Hughes, in *Herron v. Southern Pacific Company*, 283 U. S., 91, 75 L. Ed., 857 (1931), at page 861, said:

> "Where * * * and the question is one of law, the judge has the right and duty to direct a verdict for the defendant."

On the authority of *Baltimore & Carolina Line v. Redman, supra*, it can be stated further, that the supervisory power, inherent in both the federal district and circuit courts, includes the right *sua sponte* to direct judgment notwithstanding the verdict, where issues of law have been raised by proper motion during trial and expressly reserved by the court. Quoting again from that opinion (page 660):

> "This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant."

A careful reading of the last two sentences of Rule 50(b) can lead to no other conclusion because it is there explicitly provided that, whether or not a verdict has been returned, the court may direct the entry of judgment as if

the requested verdict had been directed. Thus, regardless of whether the movant has availed himself of the privilege extended by Rule 50(b) to make the post-trial motion, under both the *Redman case* and the express language of the rule, the trial judge and, therefore, the appellate Court *sua sponte* may act on the issue of law automatically reserved thereunder and, if proper, direct judgment for the movant notwithstanding the verdict. Such a construction is sound, under the cases cited, and conforms to the direction of Rule 1 that the rules "* * * shall be construed to secure the just, speedy, and inexpensive determination of every action." As pointed out in the Redman opinion, such procedure gives "* * * better opportunity for considered rulings, made new trials less frequent * * *."

A contrary construction, requiring the post-trial motion in order to vest power in the appellate court to direct judgment, rather than a new trial, would give rise to a status similar to that existing after the Redman decision, whereby, if the trial judge inadvertently forgot to reserve the question, the *Slocum rule* was applicable and ultimate justice was delayed—a result that Rule 50(b) was expressly designed to obviate. It is hardly conceivable that the committee drafting the rules would, with the *Slocum case* and the purpose of the rules in mind, have protected the district court against its own neglect to reserve, and, in the same breath, have created a pitfall for counsel. That this was not the committee's intent is proven by its Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, prepared by the Advisory Committee on Rules of Civil Procedure, dated June, 1946, at page 64. Counsel for respondent are just advised that this Court has recently acted on this report, and, in consequence of such advice, have eliminated a quo-

tation therefrom that had been made in this argument. Doubtless the Court has also noted articles on the proposed amendments by Mr. Walter P. Armstrong, past President of American Bar Association and member of the Advisory Committee, in The Lawyer and Law Notes, Vol. 1, No. 1, Fall Issue, 1946, page 3, and in 4 F. R. D., 124, at page 125.

As to the intended effect of the controverted language of Rule 50(b), it was only reasonable to provide that the movant, subsequent to an adverse verdict, could remind the court of its power to direct judgment notwithstanding the verdict. Also, where, as stated in the rule, the motion is denied or "* * * for any reason is not granted * * *" that the movant could compel the trial court to review the issue of law raised by the earlier motion, and either refuse it again or, if the court has remained silent, take positive action by either denying or granting the basic motion.

This provision seems to be, as already stated, directed solely to the procedural rights of the movant in the lower court; it affects the appellate court only to the extent that a denial by the trial judge creates a secondary error subject to correction on appeal.

The primary purpose in the adoption of Rule 50(b) was the promotion of simplicity in federal procedure. What could be simpler than a rule that a motion for a directed verdict, automatically and of its own force, reserves the question of law posed thereby until and after the jury has rendered its verdict? The trial judge can then correct any error, either *sua sponte* or by granting or refusing a subsequent motion. If the trial judge errs either way, the appellate court can then take advantage of the legal issue thus automatically reserved for its consideration, reweigh the evidence and correct the error below. New trials are thus avoided: speedy justice is done.

The Municipal Court of Appeals for the District of Columbia, in *Resnick v. Wolfe and Cohen, Inc., et al.*, 49 A. (2), 809, December 4, 1946, so interpreted Rule 46(b) of the lower court, which is substantially identical with federal Rule 50(b), saying:

> "* * * The practice of submitting cases to the jury and reserving determination of questions of law raised on motion for directed verdict, has received strong commendation in this jurisdiction and elsewhere. *Shelemaker v. Capital Transit Co.*, 79 U. S. App. D. C., 102, 143 F. (2), 142; *Fratta v. Grace Line, Inc.*, 2 Cir., 139 F. (2), 743. The Municipal Court Rule conforms to the federal rule and the reasons which have led to approval of the practice under the federal rule leads us to commend the same practice to the municipal court."

III

What effect, if any, have Rules of Civil Procedure 38 and 61 on this case?

Petitioner's counsel cite neither reason nor authority showing that either Rule 38 or Rule 61 has any relevance here; they use these rules to catapult themselves into a discussion of the merits. Is it possible that opposing counsel believe that this Court may, as it did in *Berry v. United States, Conway v. O'Brien* and *Halliday v. United States, supra*, reweigh the evidence and find it unnecessary to decide the questions of procedure under Rules 50(a) and 50(b)? In these cases the orders granting *certiorari* were unlimited; the order here limits the review to questions of federal procedure (R. 150). If it be that, technically speaking, Rules 38 and 61 are within the order, counsel for respondent are unable to find any question arising under these rules for discussion here. Their only application is to require that the mandate of the seventh amendment be obeyed.

It has long since been settled by this Court that the seventh amendment follows the common law in preserving the right of trial by jury. The established common-law powers, such as reserving questions of law arising during trial, and taking verdicts subject to ultimate ruling on questions reserved, must be regarded as among the common-law rules "* * * to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment." *Baltimore and C. Line v. Redman, supra.*

The court below did not expressly restate the elementary test to determine whether the evidence was legally sufficient to support a verdict, but its careful analysis of the law and painstaking weighing of the evidence, prior to deciding to direct judgment, demonstrate its compliance with the federal rule restated in *Slocum v. United States, supra,* and in *Gunning v. Cooley,* 281 U. S., 90, 74 L. Ed., 720, 724 and 725. Actions speak louder than words!

Granting all inferences that could reasonably be drawn from the entire evidence in petitioner's favor and viewing his testimony as charitably as possible, in accordance with the proper test, the court below determined that on all the evidence there was not sufficient basis for a verdict for plaintiff and that defendant's motion to direct should have been granted by the trial judge.

It follows, since the court below concluded that there were no facts worthy of submission to the jury, that there was no unconstitutional re-examination of the facts by the court below. Whether there was any evidence for the jury was a question of law properly reviewed on appeal. Neither the action of the trial court in erroneously deciding *contra,* nor the consequent verdict of the jury, can convert this question of law into a question of fact.

IV

Was there error below going to the merits?

PLAINTIFF FAILED TO PROVE LEGAL TITLE

Counsel for respondent cannot state the controlling South Carolina rule more clearly or succinctly than it appears in the opinion below, R. 141, 153 F. (2) at 578.

The record tends to confuse, because plaintiff was attempting to prove paper title, title by adverse possession for twenty years giving rise to the presumption of a grant, title by adverse possession for ten years, and actual possession as of the time of the alleged trespass in September, 1941, all at the same time.

Plaintiff's theory as to his chain of paper title—which he first disclosed on the trial, to the complete surprise of defendant—was that it went through his mother, back to his father and then back to his grandfather. Plaintiff introduced the deed from his mother, dated and recorded in 1920, with the attached plat (R. 51). Plaintiff also introduced the deed from his grandfather to his father, dated and recorded in 1888, covering two tracts—one of 248 acres, plus another of 72 acres, making a total of 320 acres (R. 68).

The link between plaintiff's father and mother was missing. Plaintiff was faced with two substantial difficulties in closing his link. First, was the persuasive, if not conclusive, evidence offered by defendant *contra* the identity of the two tracts of land, and, second, that there was no deed of record from plaintiff's father to his mother. It was in connection with plaintiff's effort to overcome the second difficulty, that plaintiff offered the parol testimony to prove that the title passed from his father to his mother, and that there was a deed from his father to his mother in 1917.

This is the testimony that the court below held should have been excluded by the district court on defendant's objection and stricken on defendant's motion (R. 141-142, 153 F. (2) at 578).

Plaintiff testified at pages 3-21; plaintiff's witness Harrison at page 21 and plaintiff's brother at page 26. The motions to strike are found at page 42. The record became confusing, and patience was required to keep it straight. The learned trial judge became confused.

Defendant made a motion for new trial on after-discovered evidence in the district court (R. 74) and submitted therewith copies of two instruments from the registry office for Dorchester County certified by the clerk of court. The first was a mortgage from plaintiff's father to one J. H. Cone, dated and recorded in 1928 (R. 81), and the second was a deed from plaintiff's father to plaintiff's brother, Owen C. Cone, dated and recorded in 1932 (R. 85). Both instruments covered all the land conveyed to plaintiff's father by the deed of plaintiff's grandfather in 1888, carried a covenant of general warranty by plaintiff's father, and the deed was a conveyance in fee simple.

The circuit court below did not find it necessary to pass on the denial of this motion (R. 146, 153 F. (2d), 581), but respondent submits on the general equity of the case that this record evidence is conclusive that plaintiff's father did not execute a deed to plaintiff's mother in 1917, or at any other time, covering a portion of the land conveyed to plaintiff's father by the deed from plaintiff's grandfather in 1888.

Petitioner's brief (page 18) criticizes the court below for the sentence in the opinion reading: "It may be noted that plaintiff's deed from his mother, contrary to almost

universal practice, makes no mention whatsoever of the source of his grantor's title." (R. 141). Opposing counsel then assert, without basis, that the court below placed this omission as evidence on the scales against plaintiff to prove that the mother had no title, and closes with the sentence "Not only does the record fail to indicate any such inference, but the universal practice in land matters in South Carolina is not to include the source of title." No authority is cited for this bold statement.

The record does show that the deed from plaintiff's grandfather to plaintiff's father, dated in 1888, contained unusually extensive references to the sources of grantor's title. (R. 68-70). The same is true as to the mortgage from plaintiff's father to J. H. Cone, dated in 1928 (R. 81), and also the deed from plaintiff's father to Owen C. Cone, dated in 1932 (R. 85).

The record shows also that the source of the grantor's title was stated in the following deeds introduced by defendant:

(a) From Perry to defendant (R. 57-9),
(b) From Waring to Perry (R. 59-63),
(c) From the Master to Waring (R. 62-4).

This evidence seems to vindicate the comment by the court below, when it is remembered that all three of the deeds executed by members of the Cone family referred to the source of the grantor's title.

In the face of the record, a somewhat remarkable proposition is found commencing with the last paragraph on page 27 of petitioner's brief. This opens with the statement that it was an issue of fact for the jury whether the disputed land was a portion of the grandfather's (Cone) land or a portion of the Waring plantation conveyed to defend-

ant, and continues: " * * * The only complaint then, of the plaintiff's perfect chain of title, would be a missing link between his father and his mother. It is patent that such a defect did not deny the defendant of a fair trial and such defect is a matter of form and not of substance. If the disputed land was a part of the Cone holdings, the plaintiff's witness, Owen Cone, testified in open court and it will be admitted by the defendant, is the present holder of the estate lands and all the interest of Miles Cone, the father, and would be the present holder of the title of the disputed lands as a part of the father's and grandfather's. Such a defect of form can readily be cured by a quit-claim deed from Owen Cone to his brother, the plaintiff. But the plaintiff submits that the said Owen Cone, having appeared in open court under oath, declaiming any interest in the disputed lands and acknowledging the ownership and title thereof to be in the plaintiff, it would be repugnant to substantial justice to send the case back for a new trial for the execution of a mere formal quit claim." Does this constitute a belated admission that plaintiff has never had title to the disputed tract?

As to the ruling below that parol evidence was inadmissible to prove title to real estate.

The petition for *certiorari* and supporting brief (p. 19) charged that the court below ruled that parol testimony was inadmissible to prove possession of the 106.5 acre tract of land in question by plaintiff's mother, father and grandfather. Respondent answered this, in its brief in opposition, commencing at page 3, showing that the court below did not make such a ruling; that the evidence was received to prove the phantom deed from plaintiff's father to his mother. The brief here (page 24) renews this charge.

The motions to strike are found at R. 42. They are perfectly clear when taken in connection with the preceding testimony and objections thereto. The first motion was to strike all the testimony "pertaining to the back title" * * * "in that there has been no linking up by the plaintiff with the deed" from plaintiff's grandfather to his father in 1888. The second motion was to strike "all evidence of any title or semblance of title prior to Carolina Cone * * *"—that is, plaintiff's mother. The court below referred to this as "* * * testimony with respect to the plaintiff's purported chain of title prior to the deed from his mother to him" (R. 141, 153 F. (2), 578). The parol evidence was offered and received to prove a deed from plaintiff's father to his mother. This was spoken of by the trial judge, by reason of his misapprehension, as a "lost deed" (R. 103). A better description is "phantom deed".

Appellant's (respondent's) brief in the court below (pages 31-37) asserted that the evidence was inadmissible because

(a) Title to real estate cannot be proved by parol, citing *Spence v. Spence*, 4 S. C. L. (2 Brev.), 460, 461; *Mayo v. R. R. Co.*, 40 S. C., 517, 519, 19 S. E., 73; *Metz v. Metz*, 48 S. C., 472, 488, 26 S. E., 8; *Luco v. United States*, 64 U. S. (23 How.), 515, last paragraph on 551; *Hayes v. United States*, 175 U. S., 248, 257, 44 L. Ed., 150, 154; and

(b) Parol evidence of a deed—particularly an unrecorded deed—is admissible only upon prior proof (1) of the existence of the deed, including the due execution thereof, (2) that the deed has been lost or destroyed without fault, and (3) that an appropriate search has been made therefor, citing, amongst other cases, *Floyd v. Mintsey*, 39 S. C. L. (5 Rich. L.), 361, 373; *O'Neal v. Isbell*, 43 S. C. L.

(9 Rich. L.), 367, 370; and *Uzzell v. Horne*, 71 S. C., 426, 431, 51 S. E., 253.

It was with these and other authorities before it that the circuit court below held that this tesimony was improperly admitted and retained in the case. The court evidently did not think it necessary to cite authority to support such elementary propositions.

As to the Prejudice to Defendant.

Plaintiff's claim of title was in part that in 1917 plaintiff's father had been in possession of this distinct 320-acre tract for twenty-nine years under the deed of plaintiff's grandfather in 1888 and had acquired title thereto by presumption of a grant. Note how perfectly the contested evidence filled in the gap in plaintiff's title! Plaintiff testified (a) that the 106 1/2-acre tract was part of the larger 320-acre tract owned by his father and that his brother owned the remaining portion thereof. It promptly developed that this was pure hearsay on the part of plaintiff, when plaintiff, in reply to a question by the court, testified (b) that plaintiff's father said that his grandfather had owned the 106 1/2-acre tract. This left a gap between the title of plaintiff's father and the title of plaintiff's mother which plaintiff next proceeded to close by the parol testimony in question (c), that his father had deeded the 106 1/2-acre tract to his mother.

Without this contested evidence, plaintiff had only the deed from his mother in 1920, with the Postell plat incident thereto. This amounted to nothing but a description and identification of the 106 1/2-acre tract. It gave plaintiff no title thereto and plaintiff could prove no element of possession thereof, so as to claim title by adverse possession.

This evidence enabled plaintiff to argue with some plausibility to the jury that the 106 1/2-acre tract had had a normal family history—that it was deeded from plaintiff's grandfather to plaintiff's father and then divided by his father; the 106 1/2-acre tract deeded to plaintiff's mother and then to plaintiff, and the balance deeded direct to plaintiff's brother. This was a plausible story, appealing to the average jury in the confusion of the evidence as to boundaries, as shown by the verdict. There was absolutely no competent evidence upon which to base this argument.

The danger of allowing title to real estate to be proved by parol evidence is glaringly shown by the indisputable and after-discovered record evidence, presented on the motion for a new trial, that plaintiff's father, subsequent to his alleged deed to plaintiff's mother in 1917, had first mortgaged his entire 320-acre tract (R. 81), and later conveyed this entire 320-acre tract to plaintiff's brother (R. 85), with each instrument carrying the father's warranty covering the entire 320 acres. Plaintiff's brother Owen Cone was the grantee in this deed. Did plaintiff know this equally well?

As to the Church Case.

Petitioner's brief urges more than once that the interpretation of the controlling South Carolina rule by the court below was inconsistent with the rule laid down in *Macedonia Baptist Church v. City of Columbia*, 195 S. C., 59, 10 S. E. (2d), 350. Consideration of that opinion will confirm that it is entirely consistent with the South Carolina cases cited, quoted from and followed by the court below.

The *Macedonia Church case* was an action to recover damages alleged to have been caused by surface waters

drained by the City of Columbia from its streets and cast upon the real estate of the church. The undisputed evidence proved that the plaintiff church had received a deed to the lot of land in the City of Columbia on June 14, 1914, and had then erected and had since maintained, occupied and used a church building thereon until the flooding on July 16, 1938. The trial judge held, in denying a motion for a new trial, that plaintiff had proved title (evidently by proving actual and adverse possession of the lot under claim and color of title for a continuous period of more than twenty years prior to the damage).

This proved title by presumption of a grant. The city did not even claim either possession of or title to the lot in itself. It was undisputed that the church had enjoyed actual, exclusive and continuous possession under its deed for more than twenty-four years. It was on these facts, and to the question whether the court below was correct in holding that the church had proved title, that the court was speaking. In other words, the court was there dealing with a case in which the undisputed evidence proved not only that the church was in actual possession of the lot as of the time of the damage, but also that the church had proved title by presumption of a grant and had constructive possession as an incident thereof. The *Macedonia Church case* is in no wise inconsistent with *Littleton v. Roberts*, 181 S. C., 303, 187 S. E., 349, from which the court below quoted and on which it relied in determining whether plaintiff had sufficient possession as of the time of the trespass to justify him in maintaining the action *quare clausum fregit*, in view of defendant's conflicting possession at the same time. (R. 147, 153 E. (2), at 581).

There was no conflicting claim of possession by the city in the *Macedonia Church case*. The two cases related to two

entirely different factual situations. Plaintiff here utterly failed to prove actual possession under his deed at any time, much less continuous for ten years; or for twenty years, as the church did. Since there was no deed from plaintiff's father to plaintiff's mother, plaintiff could not claim benefit from any possession of his father and grandfather because the benefit of whatever title and possession plaintiff's father and grandfather may have had passed to plaintiff's brother under the deed from plaintiff's father to plaintiff's brother (R. 85).

There was no testimony of actual possession by plaintiff.

1. All the evidence relating to plaintiff's actual possession was furnished by plaintiff's own testimony. Plaintiff testified, first, on direct examination, that his hunting, getting wood and getting clapboards, "covering for out barns and houses," was done approximately in 1923 and 1925. "The Court: How did he get them, did he cut down trees? A. I cut some lying down and sawed them up and stood them up." (R. 4). Plaintiff testified on cross examination (with reference to these acts): "Q. When was that? A. That was 1923 and 1925, and all through there. Right on through there. Q. You haven't been on it since? A. Yes, sir. Q. When was the last time after 1923? A. I went practically every year. Q. You just went on it during hunting season? A. Yes, sir. Q. The rest of the year you didn't go on it? A. I would be busy, I didn't have time. Q. You live some distance from there? A. Yes, sir." (R. 13). He later said, on cross examination, "After I moved away from there I didn't do nothing"—that during the time the timber was being cut and just prior thereto he didn't do anything (R. 15). It is possible that the witness meant that after he had moved in 1923 to Ravenel, a distance of 15 miles, he "used to go out and camp a week at a time and hunt and

get wood, etc." (R. 16) This makes an apparent contradiction of plaintiff's former testimony that he cut clapboards and wood approximately in 1923 and 1925 (R. 4).

Paraphrasing the language of Judge Parton in *Stockley v. Cissna*, 119 F., 812, "There is no legal presumption that the plaintiff's actual possession began at the date of his deed from Allen (his mother), and there is no evidence from which the jury could reasonably and legally infer that his actual possession began then, or at any other date far enough back to constitute an adverse actual possession for more than seven (ten) years before the defendant's entry."

2. Plaintiff testified that he cut the clapboards "for covering for out barns and houses." (R. 4). He did not cut them for sale. He never stated that he had cut them frequently or extensively. He did not say that the outbarns or houses were numerous or large in size, so that many clapboards were needed. It is common knowledge that a clapboard lasts for a number of years. The only reasonable inference is that plaintiff cut a few clapboards from fallen trees on one or several occasions between 1920 and 1941—each cutting a temporary and inconsequential trespass. As stated, he limited his cutting of clapboards during this 21-year period to the years 1923 and 1925, "and right on through there"; and yet he testified positively that he had moved to Ravenel, 15 miles away, in 1923 (R. 16), and that after he moved he didn't do anything, except possibly that he went hunting on the land—he did not say every year, but "I went practically every year." (R. 13).

3. His testimony as to getting wood is subject to even more vagueness and uncertainty as to time, extent and frequency, as is his testimony with reference to clapboards.

4. Remembering that plaintiff bore the burden of proving the actuality and continuity of his possession, and that

"such possession must be clearly proved and shown" (*Thomas v. Dempsey*, 53 S. C., 216, 218, 31 S. E., 231; *Rochelle v. Holmes*, 2 S. C. L. (2 Bay), 487), it seems reasonable to assert that at most plaintiff proved that he got small amounts of wood and clapboards from fallen trees on this 106 1/2-acre tract of land on several occasions, with the time, number and character of such acts utterly vague and indefinite; and that plaintiff went hunting on the land during the hunting season, once a year for a number of years between 1920 and 1941. He did not say that he went hunting every year, but only "I went practically every year." (R. 13.).

5. The acts of possession and occupancy upon which the plaintiff relied were entirely too casual, occasional, infrequent and inconsequential to constitute evidence of actual or continuing adverse possession. Is it surprising that defendant never discovered plaintiff's fugitive and inconsequential trespasses?

6. Section 379(3) of the Code of South Carolina, 1942, emphasizes the failure of plaintiff's evidence. That section (quoted at page 21 of petitioner's brief) specifies that "land shall be deemed to have been possessed and occupied" (note the use and emphasis of both words), "Where, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant." The requirement of actual occupancy is emphasized by the use of both "occupied" and "occupant." The sub-division does not designate "hunting."

The section does not limit or qualify the element of continuity or any of the other requisite elements of adverse possession; it merely says, in effect, that the acts specified shall amount to acts of actual possession and occupancy.

Plaintiff did not claim that the land "had been used for the supply of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant." "Husbandry", is used in the sense of "Agriculture; cultivation of the soil for food; farming, in the sense of operating land to raise provisions." Black's Law Dictionary, DeLuxe Ed., page 910. Plaintiff admitted that there had been no use of this kind. Plaintiff did not testify that he had used the land "for the ordinary use of the occupant." He admitted that he had never occupied any portion of the disputed land.

This narrows the question to whether plaintiff's testimony that he got wood from fallen trees on this land in "1923 and 1925 and all through there," and that on several occasions "he camped and hunted for a week at a time and got wood," manifestly for his campfires, amounted to testimony that plaintiff had for any period of time (much less for ten consecutive years) used the land "for the supply of fuel" within the meaning of this statute.

In *Bardin v. Commercial, etc., Co.*, 82 S. C., 358, 64 S. E., 165, the disputed woodland was a portion of a 441-acre tract conveyed to plaintiffs' deceased husband and father in 1882, on the other portion of which tract plaintiffs and their ancestor had lived for twenty-three years. The court emphasized that the ancestor and heirs had used the disputed land for the purpose of getting wood, straw and timber therefrom when needed and had also permitted their tenants so to do. The court again emphasized that their tacked possession was adverse and continuous for more than twenty years and that the disputed land had been "used for the supply of fuel and timber, the ordinary uses for which such land was fitted (citing Section 379)."

7. No South Carolina case has been found in which the court has discussed whether hunting is an act of pos-

session, but the general rule is that hunting is insufficient, 2 C. J. S., 549; citing *Camp Chicopee v. Eden*, 154 A., 306, 303 Pa., 150, 155, where the Court said, "An entry upon another man's lands to hunt or fish can never give title: *Wheeler v. Winn*, 53 Pa., 122." There is, however, a South Carolina case with reference to fishing in which a head note reads: "Occupation of a spot for five or six weeks annually, as a fishing place, is not possession sufficient for the statute of limitations." *Jackson v. Lewis*, 25 S. C. L. (Cheves), 259.

Plaintiff utterly failed to prove that he was in actual possession as of the time of trespass.

Plaintiff's evidence was utterly devoid of suggestion of possession at the time of the trespass. In his direct testimony, as already pointed out, he stated that the only times he had been on the land were on occasions when he hunted on it and got clapboards from it, which acts occurred in 1923 and 1925 (R. 4). On cross examination he admitted that he had never fenced the property, nor plowed it, nor that he went on it except occasionally during the hunting season. He stated that the last time he had walked all over the property was in 1923 and 1925. When closely questioned as to what he was doing about the property at the time the cutting occurred, he replied that he was doing nothing about it, in regard to farming it or living on it or fencing it or posting it (R. 12-15).

The amended complaint alleged in paragraph three (R. 2) that the trespass was committed by the cutting of the timber "during the month of September, 1941, without Plaintiff's knowledge or consent", and in paragraph four that since the fact of the cutting came to his knowledge plaintiff had "forbidden and used every reasonable means to have the Defendant desist from the trespasses

above set forth" (R. 2). Plaintiff testified that he saw about ten men, with three or four carts pulled by mules, cutting and hauling timber along about the latter part of September or October, 1941, but he didn't know how long they stayed in there. Plaintiff talked to some of them, but did not say that he protested or warned them—plaintiff did not talk with the man who was measuring the logs (R. 10). On cross examination plaintiff testified that he didn't complain to anybody except his lawyer, and that nothing was done by him (R. 14-15). Since the timber-cutting contract was dated September 18, 1941, and limited to sixty days (R. 22), it seems probable that the cutting had been going on for about two weeks before plaintiff discovered it. It seems remarkable that an extensive trespass of this kind, if it was one, could have been perpetrated and continued on a tract of 106 acres for any substantial length of time without discovery by plaintiff, if he had been in actual possession of the tract. Plaintiff's failure to complain or protest, and failure to demand that the cutting cease, when he discovered the trespass and talked with some of the men engaged therein, was not the normal reaction of an average South Carolina landowner.

The authorities cited by the court below are conclusive that these isolated acts of trespass on the property were not sufficient to establish the possession requisite to maintain this action. There is not a scintilla of evidence to the effect that at the time of the alleged trespass plaintiff was exercising any act of ownership, either actual or constructive. The acts by which plaintiff attempted to establish his possession were mere furtive comings and goings, such as a knowing trespasser would resort to, and not bold acts such as an established owner would commit. That plaintiff never had possession is made certain by the evidence adduced by defendant to prove its actual posses-

sion over a period of more than twenty years prior to the time of the trial.

As to Payment of Taxes.

Since the ultimate question on the merits was whether there was sufficient evidence of plaintiff's actual possession to go to the jury, and since the general rule admittedly is that payment of taxes does not constitute evidence of actual possession (2 C. J. S., 827), it seems irrelevant at this stage of the case to discuss the South Carolina rule as to what effect payment or non-payment of taxes may have as an element of proof in respect of title.

The South Carolina cases touching this question were, however, cited and commented on in the brief filed by respondent as appellant in the court below, as follows:

Payment of taxes for a number of years has been held to be some evidence that the State has parted with its title by grant or waiver. *Bardin v. Commercial, etc., Co.*, 82 S. C., 358, and cases cited at bottom of 359, 64 S. E., 165.

Later cases, however, raise doubt whether such evidence is competent for any purpose. "The payment of taxes is not evidence of title, as is supposed in popular myth, but the failure to pay is evidence that no claim was made." *Gadsden v. Investment Co.*, 99 S. C., 172, 180, 82 S. E., 1052. In *Saluda L. & L. Co. v. Fortner*, 162 S. C., 246, 251, 160 S. E., 594, the trial court, in an action to recover possession of land, ruled out evidence that plaintiff had returned the property for taxation, holding that it was not competent to show either possession or title or presumption of a grant. The Supreme Court said: "The Court was not without authority for its ruling (*Gadsden v. Investment Company*, 99 S. C., 172, 82 S. E., 1052); but even if the evidence should have been admitted for what it was worth,

we do not think its exclusion was reversible error * * *," and then pointed out that there was other evidence that plaintiff had returned the land for taxation.

THE EVIDENCE AS TO TITLE OF AND POSSESSION BY DEFENDANT

Defendant acquired title through the deed from Perry in 1924 (Ex. D-2, R. 57), based on the map as surveyed by Gaillard in August, 1923, and recorded on April 22, 1924, which is attached as Ex. D-1, R. 56A. Defendant proved by appropriate record evidence that Perry had acquired the property by deed from Waring in 1899, who in turn had acquired the property by inheritance from her parents. Defendant's title was traced back to a date prior to 1865, when the public records of Colleton County had been destroyed. It seems needless to burden the Court with a detailed discussion of this chain of title and the confusing evidence as to boundaries at this stage of the case. Defendant proved that when it acquired title in 1924 it began immediately thereafter and continually performed acts which demonstrated to the world that defendant had taken and was continuing complete and notorious possession of the 106.5-acre tract in question.

Defendant's evidence to this effect was summarized by the court below in this way (R. 144, 153 F. (2), 580):

> "* * * In brief, this proof of the defendant showed the cutting of an extensive fire line by the CCC on behalf of the Paper Company, the regular maintenance and clearance of this line by Company agents, the regular posting of the property by the Paper Company, entry upon the property to guard against poachers and fire hazards at intervals of about once a week by an agent of the Company, and finally the entry (herein complained of) when the bulk of the timber on the property was cut. It is difficult to see

that defendant could have done much more to assert its possession."

This was based on the testimony of defendant's witnesses Beach (R. 31-35) and Bivens (R. 35-37). Plaintiff's witness Cooley, who did the cutting for another corporation under a contract with defendant, testified on cross examination that when he went there to start the cutting in September, 1941, the agents of defendant were in charge of the property—that the lines were well marked by defendant with yellow X marks on the trees, and that the agents of defendant directed as to what timber was to be cut, etc. (R. 23). "Q. So that they were exercising possession at that time, were they not? A. Very much so." (R. 24.) Plaintiff's witness—his brother, Owen Cone—testified that he did not see the fire line, though he wouldn't say there wasn't one (R. 30). The continuous existence of these notorious acts of possession was not denied beyond plaintiff's assertion that he had never seen the postings and the fire line, one of which was established along the boundary line between the disputed tract and the Miles Cone tract of 320 acres.

CONCLUSION

It is respectfully submitted that on the entire evidence the trial judge should have directed a verdict on the compelling authority of *Littleton v. Roberts, supra,* 181 S. C., 303, 187 S. E., 349, and that, having failed so to do, there was no course for the court below to take other than the one that it followed.

Petitioner had a good deal to say in the petition for *certiorari* and the brief filed therewith as to the prejudice that petitioner would suffer by the entry of judgment below, because of his view that this would be *res adjudicata* as to petitioner's title to the land in question. Respondent

was able to assure him in its brief in opposition to *certiorari* that the doctrine of *res adjudicata* would not apply, citing *Carr v. Mouzon*, 93 S. C., 161, 76 S. E., 201, and calling particular attention to the language of the Supreme Court of South Carolina in *Littleton v. Roberts, supra.*

Respectfully submitted,

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MOTION AS TO COSTS

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER.

versus

WEST VIRGINIA PULP AND PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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MOTION AS TO COSTS

Respondent, West Virginia Pulp and Paper Company, moves the Court, pursuant to paragraph 8 of Rule 38, to enter an order excluding from taxation as costs against respondent the cost of printing and the Clerk's fee for supervising the printing of 121 pages of the transcript of record, upon the ground that they were entirely irrelevant to the questions covered by the order allowing *certiorari*, which was "limited to the questions of federal procedure raised by the writ" (T. 150), and that a reasonable effort was made by counsel for respondent to secure the printing of a proper record, by eliminating from the record the por-

tions aggregating 121 pages, as aforesaid, such effort being evidenced by the reservation made by counsel for respondent in the stipulation dated November 18, 1946 (T. 151-2).

The irrelevant portions that counsel for respondent sought to eliminate from the printed record are:

1. The excerpts from testimony of witnesses, commencing near the top of page 3 and ending about the middle of page 41, aggregating more than 37 printed pages.

2. The exhibits commencing near the bottom of page 51 (including the plat numbered 56-A) and ending at the middle of page 74, aggregating 22 pages.

3. The record of the motion for a new trial, together with the opinion and order thereon, commencing at page 75 and ending at the middle of page 105, aggregating 29 pages.

4. The excerpts of testimony of witnesses and affidavit, *etcetera*, commencing near the bottom of page 105 and extending through page 137, including pages numbered 132-a and 132-b, aggregating 33 pages.

CHRISTIE BENET,
Columbia, S. C.,
CHARLES W. WARING,
Charleston, S. C.,
Attorneys for Respondent,
West Virginia Pulp and Paper Company.

NOTICE

To Messrs. Wayne H. Unger,

W. J. McLeod, Jr.,

J. P. Mozingo, III,

Attorneys for Petitioner.

YOU WILL PLEASE TAKE NOTICE That respondent will submit the above motion to the Supreme Court of the United States in the Court Room at Washington, D. C., on Friday, the 21st day of March, 1947, at twelve o'clock noon, or as soon thereafter as counsel can be heard.

CHRISTIE BENET,

Columbia, S. C.,

CHARLES W. WARING,

Charleston, S. C.,

Attorneys for Respondent,

West Virginia Pulp and Paper Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. VONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO RECALL AND AMEND MANDATE

H. Wayne Unger,
W. J. McLeod, Jr.,
J. P. Mozingo, III,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY,

Respondent

MOTION TO RECALL AND AMEND MANDATE

Your Petitioner, A. N. Cone, hereby respectfully moves this Honorable Court to recall the Mandate in the above case, filed in the United States District Court for the Eastern District of South Carolina during this term for the purpose of Amending the said Mandate; and

1. To issue a memorandum opinion to make more definite and certain that this Court's interpretation of Rule 50b requires the making of a motion for a new trial, as well as, or in the alternative, with a motion for judgment notwithstanding the verdict before the Circuit Court of Appeals can pass upon the legal issues raised by such motions.

2. To require the said District Court of the United States for the Eastern District of South Carolina, Charleston

Division, to issue execution on the original judgment of the plaintiff, filed in said Court founded upon the verdict of the jury.

3. To direct the District Court to levy execution against the defendant for the costs of your Petitioner in this Court, in accordance with the mandate of this Court previously filed there, without regard to any off set of costs awarded the Respondent in the Circuit Court of Appeals, Fourth Circuit, which was reversed by this Honorable Court.

4. And for such further and other amendments as this Honorable Court may deem necessary and proper to provide a final determination of this case since the Respondent failed to comply with Rule 50b in not making a motion for a new trial on the grounds of erroneous introduction of testimony or any other grounds, or for judgment notwithstanding the verdict, in the alternative as he had the privilege to do.

Respectfully submitted,

H. Wayne Unger,
Walterboro, South Carolina;
W. J. McLeod, Jr.,
Walterboro, South Carolina;
J. P. Mozingo, III,
Darlington, South Carolina,
Attorneys for Petitioner, A. N. Cone.

May 17, 1947.

Notice

To: Messrs. Christie Benet and Charles W. Waring.

You will please take notice that Petitioner will submit the above motion to the Supreme Court of the United States in the Court Room at Washington, D. C., on Tuesday, the

27th day of May 1947, at twelve o'clock noon, or as soon thereafter as counsel may be heard.

H. WAYNE UNGER,
Walterboro, South Carolina;
W. J. MCLEOD, JR.,
Walterboro, South Carolina;
J. P. MOZINGO, III,
Darlington, South Carolina,
Attorneys for Petitioner, A. N. Cone.

May 17, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY,

Respondent

BRIEF ON MOTION TO RECALL AND AMEND MANDATE

To the Honorable Supreme Court of the United States:

1. Your Petitioner respectfully submits, that the misinterpretation of the opinion and mandate of this Court, heretofore filed in the District Court, during this term, by the Honorable J. Waties Waring, Judge of the United States District Court, for the Eastern District of South Carolina, Charleston Division, by his order dated May 13, 1947 (hereto attached), will lead to confusion in the orderly process of trial under Rule 50b of the Rules of Civil Procedure, if uncorrected.

Unless this Court recalls its mandate and issues instructions as prayed in this motion, the clear intent of this Court's opinion will be nullified by such misinterpretation.

It is the position of your Petitioner, that under the record in this case, where there was no motion for a new trial on the grounds of the introduction of erroneous testimony before the Trial Judge, within ten days after judgment for the Petitioner, the Court of Appeals was without authority to grant a new trial on such grounds, and a new trial was not ordered or intended by the opinion and mandate of this Court and such should be clearly so ordered at this term.

Your Petitioner respectfully submits that since the Court of Appeals, Fourth Circuit, in this case, did not order a new trial but did order entry of judgment for the defendant, it was, therefore, naturally the order of judgment for the defendant which was specifically appealed from and referred to by this Court in its opinion. Nevertheless, the record in this case specifically shows that there was no motion for a new trial on the grounds that the Court had erred in permitting the introduction of the deed and plat which the Court of Appeals by dictum indicated it thought was sufficient error to warrant a new trial. That Court stated: "It may be interjected here that harmful error unquestionably took place in the admission and failure to take from the jury of testimony with respect to the plaintiff's purported chain of title prior to the deed from his mother to him. * * * Specifically, we have already indicated our opinion that prejudicial error occurred in the admission of evidence with reference to the plaintiff's alleged predecessor in title. This ground alone is sufficient to require a remand of the case for a new trial." *West Va. Pulp & Paper Co.* v. *Cone*, 153 F. (2d) 576, pages 578 and 581.

This Court, in its opinion by Mr. Justice Black, stated: "Other questions have been discussed here, but we do not consider them. Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding

that there was prejudicial error in the admission of evidence and in the submission of the case to the jury."

The Honorable J. Waties Waring, District Judge, in construing the above language of the Circuit Court of Appeals and of the opinion of this Court, in his order staying execution by the Petitioner on his original judgment, stated: "In the opinion of the Supreme Court, it is stated that the holding of the Circuit Court of Appeals that there was prejudicial error in the admission of evidence and submission of the case to the jury was accepted without approving or disapproving of the same; and the question decided was limited solely to the power of the Circuit Court of Appeals to direct the entry of judgment for the defendant where there had been a failure to make a motion in the District Court for judgment notwithstanding the verdict as permitted in Rule 50b of the Federal Rules of Civil Procedure.—The effect of the appeal seems to be that the views of the Circuit Court of Appeals as to the impropriety of the admission of evidence and the failure of sufficient proof will prevail; but that the Circuit Court of Appeals, instead of ordering a new trial, erred in directing entry of judgment for the defendant. I can not avoid the conclusion that the practical effect of these two decisions, one by the intermediate appellate court, and the other by the Supreme Court, is that the judgment obtained in the District Court is set aside and the case is here for a new trial."

It thus can be seen that the trial court has become confused as to the meaning of this Court's opinion in the light of the fact that this Court referred only specifically to the necessity of a motion for judgment notwithstanding the verdict.

Your Petitioner respectfully submits that the opinion of this Court requires the making of a motion for a new trial necessary before the Trial Judge and within ten days after verdict and judgment, under Rule 50b as well as the mak-

ing a motion for judgment notwithstanding the verdict or, in the alternative, before the Court of Appeals can establish any law of the case or can review the legal action of the District Court on the grounds laid in such motions.

The heart and soul of this Court's opinion, rules that the Trial Judge, with the evidence fresh before his mind, and testimony still in his immediate memory, must have the opportunity to pass upon whether or not there should be a setting aside of the judgment and whether an entry of judgment for the defendant should be made, or a new trial ordered.

This Court stated in its opinion: "Rule 50b contains no language which absolutely requires a Trial Court to enter judgment notwithstanding the verdict, even though that Court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the Trial Court 'may re-open the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.' This either-or language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final determination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. And he can exercise this discretion with a fresh, personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the *bona fides* of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. *Determination of whether a new trial should be granted or a judgment entered under Rule 50b calls for the judgment in the first instance, of the judge who saw and heard the wit-*

nesses and has the feel of the case which no appellate, printed transcript can impart." • • • The Respondent failed to submit a motion for judgment notwithstanding the verdict to the Trial Judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one which it had permitted to stand."

This Court, in *Montgomery Ward & Co.* v. *Duncan*, 61 S. Ct. 189, 311 U. S. 243, has previously ruled that both parties have a *right* to have the District Court pass upon a motion for a new trial as well as motions for judgment notwithstanding the verdict. The difference in legal grounds of motion for new trial and for judgment n. o. v. to lay the basis for appellate action are discussed fully in this case. The Court, through Mr. Justice Roberts, therein stated: "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the Court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of *alleged substantial errors in admission or rejection of evidence* or instructions to the jury. • • • "The rule contemplates that either party to the action is entitled to the Trial Judge's decision on both motions, *if both are presented.*" • • • "The grounds assigned for a new trial have not been considered by the court." • • • *"If alternative prayers or motions are presented,* as here, we hold that the Trial Judge should rule on the motion for judgment. Whatever his ruling thereon

he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment n. o. v. and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, *assigning as error both the refusal of judgment n. o. v. and errors of law in the trial, as heretofore.* The appellate court may reverse the former action and itself enter judgment n. o. v. or it may reverse and remand for a new trial for errors of law."

Your Petitioner respectfully submits that it is clear from the above *Montgomery Ward & Co.* v. *Duncan* case and this Court's opinion in this case that the Circuit Court of Appeals can not pass upon errors of the introduction of testimony at trial without the prior making of such a motion for a new trial within the ten days and without the *nisi prius* court passing upon such motion. Nevertheless, this point should be specifically passed upon by this Court in the instant case for the benefit of the bench and the bar for the reason that the *Montgomery Ward & Co.* v. *Duncan* case came up under procedural facts where both motion n. o. v. and a motion for a new trial were made and this Court remanded the case to the District Court to pass upon the motion for a new trial and, therefore, no specific ruling was made in that case that the motion was required. In this Court's opinion in the instant case, since the action of the Court of Appeals in entering judgment for the defendant was appealed from, the Trial Judge takes the position that this Court's opinion is not controlling and that the question of the necessity of a motion for a new trial was not specifically passed upon and, consequently, has stayed execution of your Petitioner's judgment in the District Court.

Your Petitioner respectfully submits that the opinion of this Court, having been handed down during this same term, and the matters having been considered on Writ of Certi-

orari, in equity, and good conscience, this Court should recall its mandate and make this point specifically clear that under the record in this case, where no motion for a new trial on the grounds of error in the admission of testimony was made, the Court of Appeals could not order a new trial. Unless this Court so amends its opinion and mandate, your Petitioner will be forced to appeal from the order of the District Court (misconstruing the opinion of this court) to the Court of Appeals, Fourth Circuit, and possibly thence, by Petition for Writ of Certiorari, again to this Court, in order to clarify the matter, and that it will be in the interest of justice to directly clarify this interpretation of Rule 50b by the amendments herein moved.

2. Your Petitioner respectfully submits that he is entitled to have execution on his original judgment in the District Court, together with interest and costs as therein set out. It is the position of the Petitioner that the correct interpretation of the opinion of this Court and the mandate sent to the District Court holds that the Court of Appeals was without authority to set aside his judgment duly entered in the District Court and that such judgment now stands in full force and effect since the Circuit Court of Appeals acted without authority.

If the Respondent had made a motion for a new trial as permitted and required by Rule 50b, within the ten days after entry of the Petitioner's judgment, and if the Trial Judge had ruled thereon, your Petitioner respectfully submits that the Trial Judge could have then set forth in his order his grounds for refusing a new trial for the guidance of the Court of Appeals, to wit: The District Court could have pointed out in his order that the deed and plat showing chain of title in the plaintiff prior to the deed from his mother (which the Circuit Court of Appeals later, by *dictum*, indicated was erroneous), was not unfair to the de-

fendant because prior to the trial the defendant had noticed the plaintiff that he would introduce the identical deed and plat; and during the defendant's case at trial, he actually introduced the same deed and plat, in his own case, pursuant to his notice, even though he had previously objected and, therefore, he did not suffer any injustice by having waived any objection. If this proper procedure had been followed, to wit: Making of the motion for a new trial, stating error in introduction of the said evidence, and if the order overruling said motion had been made, it is clear that the Court of Appeals would then have properly had before it the authority to pass upon whether or not such introduction was erroneous.

However, in the instant case no such motion on such grounds or any other grounds was made within ten days, and was never passed upon by the Trial Judge and, therefore, the Circuit Court of Appeals was without authority to establish any law of the case relative to error in introduction of testimony. This is not the law of the case according to your Petitioner. Unfortunately, however, it is submitted that the District Court has misconstrued the intent and meaning of the language of the opinion of this Court by Mr. Justice Black, to mean that the Circuit Court of Appeals was correct in holding error in the introduction of testimony and that the language of this Court's opinion thereby has automatically sent this case back for a new trial.

It is the position of your Petitioner that the term reversed as used by this Court in its opinion, has the ordinary and usual definition and effect. The definition of the word "reversed", in Words and Phrases, Vol. 37, page 575, is:

> "REVERSED. The term 'reversed' means turned backward or the contrary way; turned side for side or end for end. In re McInerney, 34 P. 2d, 35, 44, 47 Wyo. 258."

"The word 'reversed' in its technical sense applies to the ultimate decision annulling expressly what had been done before." *King* v. *Sloan*, Pa. 1 Serg. & R. 77, 79.

"The term 'reversed' as used in opinions, judgments, and mandates, has received by long usage in the Courts a settled construction, and means setting aside, annulling, or vacating." *Laithe* v. *McDonald*, 7 Kan. 254, 268.

Walsh Construction Co. v. U. S. Guarantee Co., 76 Fd. 2d, page 240, 243. "It is undoubtedly the fact, as already forecast, that, when an appellate court reverses a case, without more, the general understanding among bench and bar is that the case is at an end. If the situation anywhere requires further action in the name of justice, steps must be taken promptly to modify the opinion and judgment before the lapse of the current term; otherwise the mandate in the nature of a procedendo becomes a final and unalterable command to the nisi prius court."

Since the act of the Circuit Court of Appeals in setting aside judgment of the plaintiff was completely reversed by this Court, it was rendered null and void.

Words & Phrases, Vol. 37, page 574.

"REVERSE. To reverse is to overthrow, set aside, make void, annul, repeal, or revoke, as to reverse a judgment, sentence, or decree, or to change to the contrary, *or to a former condition.* The distinction between a reversal of a judgment and an affirmance with a modification is said by the court to be too marked and radical to justify them in disregarding it, and it is held that the reversal of a judgment nullifies the same and entirely vacates it." *Cowdery* v. *London & San Francisco Bank*, 73 P. 196, 197, 139 Cal. 208, 96 Am. St. Rep. 115.

Corpus Juris Secundum, Vol. 49.

JUDGMENTS. Section 449. "A judgment which is absolutely void is at all times a nullity." (Page 879, note 55.)

"A void judgment is a nullity for all purposes." *Texas Pacific Coal & Oil Co.* v. *Ames*, 284, S. W. 315 (*supra*).

"A void judgment of an appellate court has no more validity than a void judgment of any other court." *Faris* v. *City of Coruthersville*, 162 S. W. 2d, 237. *Ralph* v. *Annuity Realty Co.*, 28 S. W. 2d, 662. (*Supra*, Note 56.)

"It is not necessary to take any steps to vacate or avoid a void judgment; it may simply be ignored." (*Supra*, Page 880.)

Since the action of the Circuit Court of Appeals in setting aside the judgment entered in the District Court was reversed by this Court, it was absolutely null and void, its dictum with reference to the propriety of a new trial inserted in its opinion without the benefit of a prior motion for a new trial in the nisi court, was of no effect and left the Petitioner and the Respondent in the same position as if no judgment of the Appellate Court had been entered, restored them to their former condition, and restored the judgment of the trial court.

"A void judgment leaves the parties in the same position as though no judgment had been entered." *Hill* v. *Hill*, 185 S. W. (2d) 245; *Corpus Juris Secundum*, Vol. 49, page 879, note 56.

4 *Corpus Juris*, Section 3249, page 1204:

"The effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered." *Sullivan* v. *Thomas*, 6 S. C. 201.

"Where a judgment of an intermediate court, holding erroneous a judgment below, is in turn held to be erroneous by a higher court, the second reversal will

usually operate to restore the judgment of the trial court;" (*Supra*, page 1205.)

Corpus Juris Secundum, Vol. 5, Appeal & Error:

"Effect of Reversal" Section 1950, page 1477.

"Where a judgment of an intermediate court, holding erroneous a judgment below, is in its turn held to be erroneous by a higher court, the second reversal will usually operate to restore the judgment of the trial court."

Your Petitioner, relying on the above law, as undisputable that the original judgment should be executed when the mandate of this Court was filed in the District Court, proceeded promptly to levy execution on the original judgment which was stayed by the District Court through its misinterpretation of the opinion of this Court. It is the position of your Petitioner that when this Court, in its opinion stated: "Other questions have been discussed here, but we do not consider them. Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submission of the case to the jury," meant that it makes no difference whether or not the Court of Appeals so stated in their opinion because no motion for a new trial was made, grounded on error of law in the admission of evidence or the submission of the case to the jury and, consequently, such determination of grounds for a new trial was beyond the scope of authority of the Circuit Court of Appeals in the light of *Montgomery Ward & Co.* v. *Duncan* (*supra*).

Immediately upon the filing of the Order of the District Court staying execution of the original judgment, when your Petitioner first learned that the opinion was subject to misconstruction, it has made this motion to recall the mandate and to amend the same.

Your Petitioner respectfully submits that the law of this case as laid down under the proper interpretation of this Court's opinion of Rule 50b, entitles your Petitioner to have this Court direct the execution of the original judgment filed in the District Court, together with interest and costs.

3. Your Petitioner respectfully submits that he is entitled to levy execution against the defendant for the costs of your Petitioner in this Court, without offset of the costs awarded the respondent by the Circuit Court of Appeals. The mandate of the Circuit Court of Appeals directed to the District Court to set aside the judgment of your Petitioner and to enter judgment for the Respondent in the amount of its costs in the Court of Appeals, and direct execution of such judgment for costs against the Petitioner. It is clear that when this Court reversed the judgment of the Court of Appeals that the judgment for costs of the Court of Appeals against your Petitioner was a nullity (see above).

The confusion arising in the District Judge's mind in misinterpreting the opinion of this Court stands out most clearly in his holding that the opinion of this Court when it reversed the judgment of the Court of Appeals did not take away such a judgment but left it a valid binding award of costs which could be offset against the execution of costs in this Court by your Petitioner. The District Court's erroneous interpretation of the opinion of this Court that the respondent really prevailed in the Court of Appeals, even though such judgment was reversed, is clearly set forth in the Trial Judge's order, "In other words, it" (the respondent) "prays that it be allowed to off set its costs in the Circuit Court of Appeals, since it really prevailed there,—I think this position is well taken and the defendant, the West Virginia Pulp and Paper Company, will be allowed to tax its costs in the appellate proceedings in the Circuit Court

of Appeals and these will be offset against the costs taxed by the plaintiff in the proceedings in the Supreme Court."

Your Petitioner respectfully submits that since this motion is made before this Court during the same term in which the mandate of this Court was issued to the District Court, and has been made as soon as the misinterpretation by the District Court and its order based thereon was filed, that your Petitioner, in good conscience, is entitled to have the mandate recalled and amended by this Court to compel execution without offset, thereby specifically clarifying this Court's interpretation of Rule 50b; that the Court of Appeals was without authority to determine error in the admission of testimony in the absence of a motion for a new trial before the District Court and, therefore, the Respondent did not prevail before the Circuit Court of Appeals.

4. Your Petitioner respectfully submits that since the opinion in this Court in this case has been misconstrued by the District Court, and that a proper construction of the opinion of this Court, to wit: that the Court of Appeals was without authority to pass upon a motion for a new trial which had not been made upon grounds which had not been stated and which had not been ruled upon by the District Court within the ten days as required by the rule, the final effect of the reversal of the judgment of the Circuit Court of Appeals in this case is final and determinative of the action; that the determination in the Circuit Court of Appeals is without force and effect.

> "If" (the respondent) "has stumbled into a technical pit from which there is no escape, *this pit was of its own digging;* and settled rules of procedure may not be broken beyond repair by our letting down a ladder (if figures of speech may be mixed) on which to climb out." *Walsh Construction Co.* v. *U. S. Guarantee Co.*, 76 Fd. (2d) 240, page 243.

The effect of this Court's opinion has not been to automatically remand the case to the District Court for a new trial and that such further proceedings as may be had shall be upon execution of the original judgment of your Petitioner without regard to the opinion or mandate of the Circuit Court of Appeals which was reversed by this Honorable Court.

Respectfully Submitted,

H. Wayne Unger,
Walterboro, South Carolina;
W. J. McLeod, Jr.,
Walterboro, South Carolina;
J. P. Mozingo, III,
Darlington, South Carolina.

May 17, 1947.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 1227

A. N. CONE, *Plaintiff*,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY, *Defendant*

Order

At the May 1945 Term the above cause came on for a trial before a jury and resulted in a verdict for the plaintiff of $15,000.00. The defendant appealed the case to the Circuit Court of Appeals for the Fourth Circuit and that court reversed the decision of the District Court (153 Fed. 2d, 576), holding that certain testimony had been improperly admitted and that there was not sufficient evidence on which to base a verdict. Instead of remanding the case for a new trial, the Circuit Court of Appeals "reversed with direction to enter judgment for the defendant."

The plaintiff petitioned, and was granted a writ of certiorari by the Supreme Court of the United States and that court reversed the order of the Circuit Court of Appeals by Opinion filed March 3, 1947, — U. S. —. In the Opinion of the Supreme Court, it is stated that the holding of the Circuit Court of Appeals that there was prejudicial error in the admission of evidence and submission of the case to the jury was accepted without approving or disapproving of the same; and the question decided was limited solely to the power of the Circuit Court of Appeals to direct the entry of judgment for the defendant where there had been a failure to make a motion in the District Court for judgment notwithstanding the verdict as permitted in Rule 50 (b) of the Federal Rules of Civil Procedure.

The plaintiff issued execution directed to the Marshal, based upon the belief that the action of the Supreme Court

had affirmed the verdict and judgment. The defendant appears by motion to set aside, cancel and stay the execution. After hearing full argument of the matter, I am of the opinion that this motion should be granted. The effect of the appeals seems to be that the views of the Circuit Court of Appeals as to the impropriety of the admission of evidence and the failure of sufficient proof will prevail; but that the Circuit Court of Appeals, instead of ordering a new trial, erred in directing entry of judgment for the defendant. I cannot avoid the conclusion that the practical effect of these two decisions, one by the intermediate appellate court, and the other by the Supreme Court, is that the judgment obtained in the District Court is set aside and the case is here for a new trial. It is, therefore, improper to issue execution, and I am of the opinion that a new trial must be had in the light of these decisions.

The defendant also served a motion which was heard today in the matter of costs. Its position is that it prevailed in the Circuit Court of Appeals and should be allowed to tax its costs against the plaintiff, although it admits that the taxable costs in the Supreme Court are to be charged against it, the defendant. In other words, it prays that it be allowed to offset its costs in the Circuit Court of Appeals since it really prevailed there and the Supreme Court's Opinion is based only upon matters of procedure and proper remedy and does not reverse the case on its merits. I think this position is well taken and the defendant, West Virginia Pulp and Paper Company, will be allowed to tax its costs in the appellate proceedings in the Circuit Court of Appeals and these will be offset against the costs taxed by the plaintiff in the proceedings in the Supreme Court. These amounts of costs will of course, be limited to the appellate proceedings and the matter of costs in the District Court will be left for the final disposition of the case. Accordingly, it is

Ordered that the motion to set aside, cancel and stay the execution hereinabove referred to be and the same is hereby granted. It is

Further ordered that leave be granted to tax and offset costs in accordance with the above set forth views.

J. WATIES WARING,
United States District Judge.

Charleston, S. C., May 13, 1947.

A true copy, attest.

[SEAL.]

ERNEST L. ALLEN,
Clerk of U. S. District Court
East. Dist. So. Carolina.

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CHARLES ELMORE CROPLEY
CLERK

BRIEF IN OPPOSITION TO MOTION TO RECALL AND AMEND MANDATE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY,
RESPONDENT

CHRISTIE BENET,
J. B. S. LYLES,
Columbia, S. C.,
D. A. BROCKINTON,
CHARLES W. WARING,
Charleston, S. C.,
Attorneys for Respondent, West Virginia Pulp and Paper Company.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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BRIEF IN OPPOSITION TO MOTION TO RECALL AND AMEND MANDATE

United States Circuit Court of Appeals

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY, RESPONDENT

I

REASONABLE NOTICE OF THE MOTION WAS NOT GIVEN RESPONDENT

Notice of this motion was served personally on Charles W. Waring, Esq., of counsel for respondent, by H. Wayne Unger, Esq., of counsel for petitioner, about five o'clock on the afternoon of May 21, 1947. The notice is dated May 17, 1947, and returnable on May 27, 1947. Mr. Unger declined an offer made by Mr. Waring to acknowledge service on the original. This service gave counsel for respondent four working days, including Saturday but excluding Sunday, within which to prepare and have printed any brief

to be filed by noon of May 27. It was and has been impossible for counsel for respondent to file this brief within that time. It was the good forturne of counsel for respondent, and apparently not within the contemplation of counsel for petitioner, that the Court recessed for two weeks, commencing May 26. The Clerk advised us that this Court will accept and consider this brief if filed during the first week of June. In such event we will suffer no prejudice and waive this objection; otherwise we are obliged to insist upon it.

II

THE MOTION IS NOT IN ORDER UNDER THE ESTABLISHED PRACTICE

The opinion of this Court herein was filed March 3, 1947. Its mandate was dated April 17, 1947, and marked filed in the District Court on April 19, 1947. The time within which a petition for rehearing could be filed under Rule 33 expired March 28, 1947.

This Court lost jurisdiction when its mandate went down; it "cannot grant a rehearing in a case which has been remitted to the court below." *Peck v. Sanderson*, 59 U. S. (18 How.), 42, 15 L. Ed., 262; *Browder v. McArthur*, 7 Wheat., 58, 5 L. Ed., 397.

This Court will not recall its mandate for the purpose of re-examining a cause on the merits (*Peck v. Sanderson, supra; Browder v. McArthur, supra*), or for the purpose of granting supplemental relief (*Sibbald v. U. S.*, 11 U. S. (2 How.), 455, 11 L. Ed., 337), although it has done so to correct a clerical error in the name of a party in the title of the cause. (*Killian v. Ebbinghaus*, 111 U. S., 798, 28 L. Ed., 593.)

III

THE MANDATE OF THIS COURT HAS BEEN COMPLIED WITH

There was no judgment of record in favor of Cone in the District Court upon which execution could lawfully issue on May 2, 1947. District Judge Waring entered an order on April 1, 1946, pursuant to the mandate of the Circuit Court of Appeals, which provided that the original judgment entered in favor of Cone on June 5, 1945, for $15,000.00, with interest, and costs, "be and the same is hereby reversed and set aside and that the Clerk make appropriate entries accordingly." A certified copy of this order is attached hereto as Exhibit "A". Appropriate entries were made by the Clerk. The result was that the original judgment was reversed and set aside. It thereupon ceased to exist as a basis for issuance of execution.

The mandate of the Supreme Court was dated April 17 and filed in the District Court on April 19, 1947, but no steps or proceedings had been taken pursuant thereto by the District Court prior to May 12, 1947. It follows that the order of the District Court of April 1, 1946, was still in force and effect, and that there was no legal basis for the issuance of execution. We submit, therefore, that there was no legal step that Judge Waring could take as of May 12, 1947, except to "set aside, cancel and stay the execution," as he did in his order of May 13, 1947.

If Cone desired to lawfully issue execution, his first requisite step was to secure vacation of the order of the District Court entered April 1, 1946, Exhibit "A" hereto, unless the mandate of this Court had commanded the District Court to reinstate the original judgment in favor of Cone. In such event the District Court could have taken appro-

priate action *ex parte*. This was the question that Judge Waring primarily considered and decided in his order of May 13, 1947. His decision was contra Cone's contention, and, we submit, was unquestionably correct.

When *Mutual Life Ins. Co. v. Hill*, 193 U. S., 551, 48 L. Ed., 788, came on for a second hearing in the Supreme Court question arose as to the effect of the first judgment of the Supreme Court, whereby the judgment below had been reversed and the case remanded for further proceedings. The court, speaking through Mr. Justice Brewer, said in part:

> "* * * Clearly, the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. **Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.** An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the

record and have not already been decided are open for consideration." (Emphasis added.)

On the second appearance of *Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S., 552, 69 L. Ed., 785, the Court, speaking through Mr. Justice Van Devanter, said in part:

"Both parties rely on our decision when the case was first here. One insists that by reversing the original judgment of the state court, and not merely a part of it, we adjudged the invalidity of the entire act; and the other that by particularly declaring the provisions permitting the fixing of wages invalid and saying nothing about the provisions permitting the fixing of hours of labor we impliedly held the latter valid. Both contentions are wrong. 'A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.' *Mutual L. Ins. Co. v. Hill*, 193 U. S., 551, 553, 48 L. Ed., 788, 791, 24 Sup. Ct. Rep. 538."

In *Gulf Refining Co. v. U. S.*, 269 U. S., 125 at 135, 70 L. Ed., 195 at 198, this Court said:

"The government first contends that the decrees are not final and that the appeals should be dismissed because the court of appeals remanded the cases 'for further proceedings not inconsistent with the opinion of this court.' The general rule established by many decisions, of which *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. Ed. 117, 22 Sup. Ct. Rep. 49, is an example, is that the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final. But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. *Metropolitan Water Co. v.*

Kaw Valley Drainage Dist. 223 U. S. 519, 523, 56 L. Ed., 533, 535, 32 Sup. Ct. Rep. 246. * * *"

The mandate here expressly requires that the opinion be considered, so that recourse need not be had to any rule of construction to reach this result. The mandate of the Supreme Court (second paragraph on page two) first reversed with costs the judgment of the Circuit Court of Appeals, providing that Cone recover "$700.79 for his costs herein expended and have execution therefor." In the third paragraph on page two, the Supreme Court remanded the cause to the District Court "for proceedings **in conformity with the opinion of this Court.**" The formal conclusion (fourth paragraph on page two) commands "that such execution and proceedings be had in said cause **in conformity with the opinion** and judgment of this Court," as according, etc., * * * "ought to be had, the said writ of *certiorari* notwithstanding." (Emphasis added.)

There is nothing in this mandate to justify the contention of opposing counsel. The "execution" last mentioned is manifestly the execution for costs in the Supreme Court, referred to in the second preceding paragraph. The "proceedings (to) be had in said cause" are manifestly the "proceedings in conformity with the opinion of this Court", as directed in the paragraph immediately preceding. The result is that the mandate itself refers to the opinion of the Supreme Court and we now briefly analyze this.

The first paragraph of the opinion gives a concise history of the case in the District Court.

The second paragraph of the opinion divides the opinion of the Circuit Court of Appeals into two parts—the first holding that there was prejudicial error in the admission of evidence on the trial and that plaintiff's evidence showing possession was insufficient to go to the jury. This paragraph

then emphasizes that (in the second part of its opinion) the Circuit Court of Appeals, instead of remanding the case for a new trial, directed that judgment be entered for defendant and thus construed Rule 50(b) in a manner, as the Supreme Court next explained, that raised the sole question that the Supreme Court intended to consider. The third paragraph of the opinion repeats and emphasizes this.

This brings the opinion to a discussion of the sole question decided by the Supreme Court, to wit, whether the Circuit Court of Appeals had power to direct entry of a judgment notwithstanding the verdict under Rule 50(b), where a timely motion for judgment *non obstante veredicto* had not been made as required by the Rule. The Supreme Court then decided that no such power existed. That is all that it did decide—this one question.

"Reversed", as used by the Supreme Court in concluding its opinion, means, giving effect to the context, "reversed in so far as we have considered the holdings of the Circuit Court of Appeals". This was only the holding of the Circuit Court of Appeals that it had power to direct the entry of judgment, instead of granting a new trial. Any other construction would charge the Supreme Court with having reversed the Circuit Court of Appeals' holdings when the Supreme Court expressly excluded these from consideration—as the Supreme Court itself immediately emphasized by saying that it accepted, "without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submisson of the case to the jury".

The best argument to support our contention as to the limited effect of the judgment of the Supreme Court is to contrast illustrative opinions in cases where the Supreme Court manifestly intended that a money judgment entered

on a verdict for plaintiff in the district court, which had been reversed by the court of appeals, should be reinstated under the accepted rule quoted from the cases cited *supra*. The controlling test, of course, is whether the Supreme Court itself reviewed the evidence and decided that it was sufficient to go to the jury. It is not reasonable to impute to this Court an intention to adjudicate as to the merits when the Court has not considered the merits. This would hardly be in accord with due process of law. Three such cases are cited by way of history in this (Cone) opinion, to wit, *Conway v. O'Brien*, 312 U. S., 492, 85 L. Ed., 969; *Berry v. U. S.*, 312, U. S., 450, 85 L. Ed., 945; and *Halliday v. U. S.*, 315, U. S., 94, 86 L. Ed., 711.

The *Conway* suit was one for damages for personal injuries received by plaintiff while riding as a guest in defendant's automobile by reason of the alleged gross negligence of defendant. The *Berry* and *Halliday cases* were suits on policies of war risk insurance wherein plaintiff bore the burden of proving his disability, which was the controlling fact in issue. In each case the district court had refused a motion to direct a verdict for defendant and judgment had been entered for plaintiff on a verdict of the jury. In each case the circuit court of appeals had reversed the judgment below and had dismissed the action or remanded the case to the district court with direction to enter judgment in favor of defendant. In each case the Supreme Court granted *certiorari* without limiting the writ (as it did in this (*Cone*) *case*) to questions of Federal procedure. In each case the Supreme Court considered and reviewed the evidence for plaintiff in detail and itself held that it was sufficient to take the case to the jury.

In the *Conway case* the last paragraph of the opinion by Mr. Justice Reed reads: "We reverse the judgment of

the Circuit Court of Appeals and affirm that of the District Court".

In the *Berry case* the last sentence of the opinion by Mr. Justice Black reads: "The judgment of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed".

In the *Halliday case* the last paragraph of the opinion by Mr. Justice Byrnes reads: "The case is remanded to permit the reinstatement of the judgment of the District Court".

We have already pointed out that in this (*Cone*) *case certiorari* was limited to questions of Federal procedure and that the Supreme Court did not review or consider either of the two holdings going to the merits upon which the Circuit Court of Appeals reversed the judgment of the District Court, but expressly accepted both of these. There can be no doubt that the result intended and accomplished by the Supreme Court here was a new trial in the District Court.

IV

A. DEFENDANT MADE A MOTION FOR A NEW TRIAL IN THE DISTRICT COURT

We attach hereto as Exhibit "B" a certificate of the Clerk of the District Court dated May 23, 1947, copying an entry in the official minutes of the District Court with respect to the proceedings had in this cause, showing that a motion by defendant for new trial was made on May 22, 1945—that the same was argued by Mr. Waring, and that the motion was refused and exception noted.

We attach also, as Exhibit "C", an order by Honorable J. Waites Waring, United States District Judge, be-

fore whom the cause was tried, filed December 3, 1945, ordering the Clerk of the District Court to send this order to the Circuit Court of Appeals, as an "Order amending the Transcript of Record to show that immediately after verdict, the Defendant, West Virginia Pulp & Paper Company, moved for a new trial, stating as grounds for new trial the same points listed by the Defendant in its motions to dismiss and for a directed verdict; let the record further show that on hearing the said motion was refused".

This *ex parte* order clearly indicates that it was passed on the suggestion of plaintiff's attorneys by its recital, to wit, "it having been brought to my attention by Plaintiff's Attorneys that the stenographic record is incomplete".

We also call attention to page 139 of the Transcript of Record in this Court, where is found among the Minute Entries of proceedings in the Circuit Court of Appeals, the following:

> "December 6, 1945, certified copy of order of District Court amending the transcript of record is filed.
>
> Note: This appears at page 232a of the complete transcript of record and is, therefore, omitted here."

We do not have access to page 232a of the complete transcript of record referred to in the entry; we assume that this is filed with the Clerk of this Court. These minute entries further show that the case was argued on January 10, 1946, before the Circuit Court of Appeals.

In the face of this record, which indicates that the order supplementing the record to show that this motion for a new trial was made in the District Court was originated by plaintiff's attorneys, it is difficult for us to understand how the same counsel can now assert to this Court in this Motion and brief that no such motion was made in the District Court.

We state frankly to the Court that we have always been and still are of the firm opinion that the question whether a motion for a new trial was made in the District Court was and is entirely irrelevant to any question raised on the appeal to the Circuit Court of Appeals or on the *certiorari* from this Court. We later give our grounds and reasons for this view. But the opinion of this Honorable Court has shown that we were wrong in our opinion as to the meaning of Rule 50(b), and it may well be that we are wrong in our opinion that the question whether a motion for a new trial was made in the District Court is utterly irrelevant. If so, we ask this Court to bear in mind, if it should give further consideration to this extraordinary motion, that the record before this Court shows that defendant made a motion for a new trial in the District Court.

IV

B. AS TO THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS

Petitioner's motion and brief, if we read them correctly, ask this Court to amend and enlarge its opinion by filing a memorandum opinion making it clear that this Court adjudged that the Circuit Court of Appeals was utterly without jurisdiction and its judgment an absolute nullity, because respondent (as defendant below) made no motion for a new trial in the District Court. This motion impliedly admits that this Court has actually made no such adjudication and asks that it recall the mandate at this late day and do so now. This Court will hardly consider this phase of the motion in view of the fact, shown in subdivision A of this point, that such a motion was in fact made. Thereby this phase of the motion is rendered academic.

It seems fantastic to suggest that this Court will now, or on such a motion as this, consider and decide this question. Petitioner, as appellee in the Circuit Court of Appeals, made no motion there to dismiss the appeal. There was no suggestion in his brief there that the Circuit Court of Appeals was without jurisdiction, on this or any other ground. The Circuit Court of Appeals did not either consider or decide any such question, or refuse or fail so to do, because no such question was raised before it. Apart from the manifest truism that no such question was brought before this Court by the limited writ of *certiorari*, the opinion of this Court shows that, in truth and fact, no such question was considered by it. Such question was not mentioned in any of the briefs filed in this Court or in oral argument.

It is our understanding that opposing counsel contend that this Court construed Rule 50(b) of the Federal Rules of Civil Procedure as putting into effect in federal practice the rule of procedure that prevails in some jurisdictions, only by virtue of statutory provisions or rules of court, "that errors occurring during the progress of the trial shall be made the basis of a motion for a new trial as a prerequisite to the consideration of such errors on appeal". 4 C. J. S., page 770, sec. 352. This is the first suggestion that we have heard that Rule 50(b) works such a material innovation in federal practice. We have never heard a suggestion that this new trial rule applied in the federal courts in an active practice in such courts in this State extending over some forty years.

An examination of the authorities—as careful and exhaustive as we could make in the limited time allowed—discloses only three federal cases in which the contention has been made that a motion for a new trial is a condition prerequisite to the consideration on appeal of errors made during the course of the trial, to wit; *Aaron v. U. S.* (C. C.

A.-8), 155 F. 833, 838; *Boatmen's Bank v. Trower Bros. Co.* (C. C. A.-8), 181, F. 804, 806; *Chicago Life Ins. Co. v. Tiernan* (C. C. A.-8), 263, F. 325, 330. The opinions in the last two cases are by Judge Sanborn. All three cases hold that such a rule does not exist in federal practice and that the Conformity Act does not apply. We take it that the paucity of cases is due to the fact that this suggestion has so seldom been made.

In passing we note that the Supreme Court of South Carolina has periodically reiterated that this new trial rule does not apply in this State. The latest decision is *Bell v. Atlantic Coast Line R. Co.*, 202 S. C., 160, 24 S. E. (2d), 177. A reader of that case will note that the first opinion, by Chief Justice Bonham, is a minority opinion, and that the second opinion, by Mr. Associate Justice Fishburne, is the opinion of the Court, because the other three justices concurred therein.

This Court would hardly work such a change in federal practice without considering the question and expressing its intention so to do, after giving counsel an opportunity to be heard thereon. If the Court intended to bring about such a change, we submit that it did not express such intention in its opinion. The opinion does not use the words "motion for a new trial", except that in stating the facts it reads "The respondent moved for a new trial on the ground of newly discovered evidence". Thereafter it refers to "a motion for judgment notwithstanding the verdict". The *ratio decidendi* is that "In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand".

Rule 50(b) does not require either litigant to make a motion for a new trial for any purpose or at any time; it

merely carries this permissive sentence: "A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative".

Rule 59 relates to new trials and provides, in so far as concerns an action in which there has been a trial by jury (which is our case), that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States". There is nothing in this rule, or any other of the Federal Rules of Civil Procedure, or in any rule of court, or in any federal statute, which touches the startling innovation in federal practice that opposing counsel suggest has been worked by the opinion of this Court in this case, in so far as we have ever heard or have been able to discover.

Rule 52(b) of the Federal Rules of Civil Procedure somewhat relaxes the former requirements for a review in the appellate court of findings of fact made in actions tried by the court without a jury, by providing that a party litigant need not, in order to save his right to a review thereof by the appellate court, even make an objection to such findings or make a motion to amend them or a motion for judgment in the District Court.

Rule 46 liberalizes the former rule as to formal exceptions. While Rule 72 preserves the former requirement of an assignment of errors on appeal from a District Court to this Court, this requirement has been relaxed in respect of appeals to a Circuit Court of Appeals. This indicates a relaxation of technical and useless requirements.

The transcript of record shows affirmatively that an exception was allowed defendant below in respect of each of its two motions to strike out the testimony, and also of the refusal of defendant's motion for a directed verdict (pages 42 44). There was not a suggestion made in the

brief or in the oral argument before the Circuit Court of Appeals that defendant had not saved its right to have both these questions considered and decided on the appeal. There was no basis for such a suggestion then, and there is no basis for such a suggestion now.

A careful re-reading of *Montgomery Ward & Co. v. Duncan*, 311 U. S., 243, 85 L. Ed., 147, cited by petitioner, does not suggest to our mind any relation between the *ratio decidendi* of that case and the question here under consideration. Our view is confirmed by the fact that this Court did not cite that case in its opinion.

We read *Aspen Mining, etc., Co. v. Billings*, 150 U. S., 31, 37, 37 L. Ed., 986, 988, as conclusive authority that this Court will not decide any question as to the jurisdiction of the Circuit Court of Appeals on this motion.

V

AS TO SETTING OFF THE JUDGMENT FOR COSTS

Judge Waring followed the general rule which applies in South Carolina and is stated in *Rookard v. Atlanta & C. A. L. Ry. Co.*, 89 S. C., 371, 376, 71 S. E., 992:

> "The jurisdiction of the Court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties. It is not founded on any statute or fixed rule of Court, but grows out of the inherent equitable jurisdiction which the Court exercises over suitors in it. Such motions are, therefore, addressed to the discretion of the Court—a discretion which is not arbitrarily or capriciously exercised, but according to settled principles. *Ex parte* Hiers, 67 S. C., 114, and cases cited. When it would result inequitably, set off should be refused. On the other hand, it should be allowed, when justice requires it, unless the Court is compelled to refuse it in

obedience to some provision of the Constitution or statutes."

We submit that Judge Waring was right in holding that respondent was the prevailing party on the appeal to the Circuit Court of Appeals, after the mandate of this Court came down, and was then entitled immediately to execution of the judgment for its costs in the Circuit Court of Appeals. The costs in the District Court, taxed in favor of Cone and entered in the original judgment, will abide the event of the second trial. *Land Oberoesterreich v. Gude* (C. C. A. 2), 93 F. Rep., 292.

We submit, further, in respect of this matter of costs in the Circuit Court of Appeals, as well as the matter of set-off, that it is a question to be considered on appeal to the Circuit Court of Appeals and one that should not be taken over and decided by this Court on this motion.

VI

AN INCORRECT STATEMENT

The incorrect statement is found on typed page 7 of the brief where opposing counsel now say, in effect, that the parol evidence to prove title, which was held incompetent and prejudicial by the Circuit Court of Appeals, related to the deed from plaintiff's grandfather to plaintiff's father and was not introduced to supply the missing link or deed between plaintiff's father and his mother. The brief then goes on to argue that if a motion for a new trial had been made, the District Judge would have pointed out that defendant had waived its objection to this evidence by itself introducing a certified copy of the deed, to the proof of which the evidence was directed. (Defendant's Ex. D-13, Transcript, page 68.) The petition for *certiorari* and supporting brief asserted (page 19) that this parol testimony was directed to prove possession of the tract of land

in question by plaintiff's mother, father and grandfather. We pointed out the error of this statement, commencing about the middle of page 3 of our brief in opposition to *certiorari*. The brief filed by petitioner on *certiorari* (page 24) renewed this contention which we answered, commencing about the middle of page 23 in our brief on *certiorari*.

Petitioner now switches to the contention that the parol testimony related to the deed from the grandfather, Adam Miles Cone, to the father, Miles Cone, which plaintiff introduced as Ex. P-C (at page 6 of the Transcript). This is the same deed, another certified copy of which was introduced by defendant as defendant's Ex. D-13 (at page 68 of the Transcript). The brief here asserts (typed page 7) that defendant had previously given notice of its intention to introduce this deed, along with a plat which was not attached to the certified copy of this same deed that plaintiff had introduced as his Ex. P-C.

It is utterly incomprehensible to us why plaintiff would want to introduce parol evidence to prove a duly recorded deed that was in existence, of which both parties had certified copies, which was introduced by plaintiff and concerning which defendant had given plaintiff previous notice of its intention to introduce the same. The present proposition seems to be utterly fantastic and to answer itself.

Respectfully submitted,

CHRISTIE BENET,
J. B. S. LYLES,
Columbia, S. C.,
D. A. BROCKINTON,
CHARLES W. WARING,
Charleston, S. C.,
Attorneys for Respondent, West Virginia Pulp and Paper Company.

EXHIBIT "A"

Order

Civil Action No. 1227

Pursuant to the mandate of the United States Circuit Court of Appeals, Fourth Circuit, filed in this Court and to comply therewith:

IT IS ORDERED That the judgment entered in this Court in favor of the plaintiff against the defendant on June 5, 1945, in the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars, on the verdict of the jury, together with interest thereon from May 22, 1945, at six per centum (6%), and together with Eighty-seven and 70/100 ($87.70) Dollars, costs, be and the same is hereby reversed and set aside and that the Clerk make appropriate entries accordingly; and

IT IS FURTHER ORDERED That the Clerk do forthwith enter judgment for the defendant and that the Clerk tax the costs which defendant is entitled to recover of plaintiff and enter judgment in favor of the defendant against plaintiff therefor; and

IT IS FURTHER ORDERED That the removal bond and the appeal bond filed by the defendant in this cause be and the same are hereby cancelled, and the principal and sureties thereupon are exonerated from any and all liability in connection therewith.

J. WATIES WARING,
United States District Judge.

Charleston, S. C.,
April 1st, 1946.

A TRUE COPY, ATTEST
ERNEST L. ALLEN,
Clerk of U. S. District Court
Eastern District of South
Carolina (SEAL)

EXHIBIT "B"

Certificate of Clerk

Civil Action No. 1227

I, Ernest L. Allen, Clerk of the District Court of the United States for the Eastern District of South Carolina, do hereby certify that the official minutes of the Court with respect to the proceedings had in the above entitled cause contain the following entry:

"The Court opened at Charleston, S. C., on May 22, 1945, according to adjournment, Honorable J. Waties Waring presiding.

Appearances: Jefferies, McLeod & Unger, J. P. Mozingo for Plaintiff; Waring & Brockinton for Defendant.

Motion by Defendant for new trial—(Motion refused and exception noted.)

Arguments: Pro motion, Mr. Waring."

I do further certify that in the official minutes of the Court with respect to further proceedings in the above entitled cause had on August 6, 1945, there appears the following entry:

"Motion by Defendant for new trial on ground of newly discovered evidence."

WITNESS my hand and official seal the 23rd day of May in the year of our Lord one thousand nine hundred and forty-seven.

/s/ ERNEST L. ALLEN. (SEAL)

EXHIBIT "C"

Order

Civil Action No. 1227

The above-entitled case having been appealed to the Circuit Court of Appeals, and the Transcript of Record hav-

ing been previously certified, together with the original exhibits, and it having been brought to my attention by Plaintiff's Attorneys that the stenographic record is incomplete, in that the stenographic transcript does not show that the Defendant moved for a new trial immediately after verdict was rendered basing said motion on the same grounds as previous motions by Defendants to dismiss and for a directed verdict which are set forth in the transcript; that said motion for a new trial on said grounds was refused by me; and pursuant to authority vested in me by Rule 75 (H), under Rules of Civil Procedure, it is

ORDERED that the Clerk of this Court send up to the Circuit Court of Appeals for the Fourth Circuit, this Order amending the Transcript of Record to show that immediately after verdict, the Defendant, West Virginia Pulp and Paper Company, moved for a new trial, stating as grounds for new trial the same points listed by the Defendant in its motions to dismiss and for a directed verdict; let the record further show that on hearing the said motion was refused.

J. WATIES WARING,

J. WATIES WARING, United States District Judge.

Charleston, South Carolina,
December 3, 1945.

A TRUE COPY, ATTEST
/s/ ERNEST L. ALLEN,
Clerk of U. S. District Court
Eastern District of South Carolina (SEAL)

J. WATIES WARING,
U. S. District Judge.

PROOF OF SERVICE

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

Personally appears Berta Wallace, who, being first duly sworn, says that she is secretary to J. B. S. Lyles, Esq., one of the attorneys for the respondent in the above cause; that on the 30th day of May, 1947, at 10:55 o'clock in the A. M., she deposited in the United States mail chute in the Liberty Life Building, Columbia, South Carolina, a sealed envelope carrying the requisite amount of postage and addressed to H. Wayne Unger, Esq., Attorney at Law, Walterboro, South Carolina, and that the said envelope contained a carbon copy of the within brief.

BERTA WALLACE.

Sworn to and subscribed before me this 30th day of May, 1947.

(SEAL)

W. C. McGOWAN,

Notary Public for South Carolina.

My commission expires at the pleasure of the Governor.

SUPREME COURT OF THE UNITED STATES

No. 184.—October Term, 1946.

A. N. Cone, Petitioner,
v.
West Virginia Pulp and Paper Co.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 3, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner brought this action in a South Carolina state court. Upon motion of respondent, it was removed to the Federal District Court because of diversity of citizenship of the parties. The complaint claimed $25,000 damages upon allegations that the respondent's agents had trespassed upon and cut timber from lands owned by and in the possession of the petitioner. Respondent's answer denied that the petitioner had title or possession of the lands and timbers. Both title and possession became crucial issues in the trial. The burden of proving them rested on the petitioner.[1] When all the evidence of both parties had been introduced, the respondent moved for a directed verdict in its favor on the ground that the petitioner had failed to prove that he either owned or was in possession of the land.[2] This motion was

[1] Under governing South Carolina law an action such as this is not one to try title but "to recover damages for trespass of property of which the plaintiff was in possession." *Macedonia Baptist Church* v. *City of Columbia*, 195 S. C. 59, 70. But possession may be presumed from proof of legal title. *Beaufort Land and Investment Co.* v. *New River Lumber Co.*, 86 S. C. 358; *Haithcock* v. *Haithcock*, 123 S. C. 61; Code of Laws of South Carolina (1942) § 377. Petitioner here undertook to prove possession both by showing that he had legal title and by showing that he had openly and notoriously exercised acts of dominion, possession, and ownership over a long period of years.

[2] Respondent first moved to dismiss the case on the same grounds under Rule 41 (b) of the Rules of Civil Procedure. That rule pro-

denied. The jury returned a verdict for petitioner for $15,000, and the court entered judgment on the verdict. The respondent moved for a new trial on the ground of newly discovered evidence. This motion was denied. Respondent did not move for judgment notwithstanding the verdict as it might have done under Rule 50 (b) of the Federal Rules of Civil Procedure, which is set out below.[3]

The Circuit Court of Appeals decided that the admission of certain evidence offered by the petitioner to prove legal title was prejudicial error. It held that without this improperly admitted evidence petitioner's proof was not sufficient to submit the question of title to the jury. That court also held that petitioner's evidence showing possession was insufficient to go to the jury. It therefore reversed the case. But instead of remanding it to the District Court for a new trial, the Circuit Court of Appeals

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vides for a dismissal, under the circumstances and conditions there set out where "upon the facts and the law the plaintiff has shown no right to relief." Since substantially the same disposition of the case on the same grounds was later requested by respondent in the motion for a directed verdict, we shall have no occasion further to discuss the motion to dismiss.

[3] 50 (b) "RESERVATION OF DECISION ON MOTION.—Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

directed that judgment be entered for respondent. That court has thus construed Rule 50 (b) as authorizing an appellate court to direct a judgment notwithstanding the verdict, even though no motion for such a judgment had been made in the District Court within ten days after the jury's discharge.

The petition for certiorari challenged the power of an appellate court to direct entry of a judgment notwithstanding the verdict where timely motion for such a judgment had not been made in the District Court. On three previous occasions we have granted certiorari to consider this point but failed to reach it because, upon examination of the evidence, we found it sufficient to justify submission of all three cases to the jury. *Conway* v. *O'Brien*, 312 U. S. 492; *Berry* v. *United States*, 312 U. S. 450; *Halliday* v. *United States*, 315 U. S. 94. In this case we granted certiorari "limited to the questions of federal procedure raised by the petition for the writ." — U. S. —. The point we had in mind was whether a party's failure to make a motion in the District Court for judgment notwithstanding the verdict, as permitted in Rule 50 (b), precludes an appellate court from directing entry of such a judgment. Other questions have been discussed here, but we do not consider them. Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submission of the case to the jury.

Rule 50 (b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the trial court "may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." This "either-or" language means what it seems to mean, namely, that there are circumstances which might lead the

trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. See *Berry v. United States, supra*, 452–453.[4] And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. See *March* v. *Philadelphia & West Chester Traction Co.*, 285 Pa. 413, 418; *Bunn* v. *Furstein*, 153 Pa. Super. 637, 638. See also *Yutterman* v. *Sternberg*, 86 F. 2d 321, 324. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded "a last

[4] The Advisory Committee on Rules for Civil Procedure in commenting on Rule 50 (b) stated that "A trial court or an appellate court in setting aside a verdict always has discretion, if justice requires it, to order a new trial, instead of directing the entry of judgment. Rule 50 (b) states that the court on a motion for judgment notwithstanding the verdict 'may either order a new trial or direct the entry of judgment' for the moving party." Report of Proposed Amendments to Rules of Civil Procedure (1946) 66. See also New York Symposium on Federal Rules (1938) 283–284. Compare *March* v. *Philadelphia & West Chester Traction Co.*, 285 Pa. 413; *Nadeau* v. *Maryland Casualty Co.*, 170 Minn. 326, 331; *Anderson* v. *Newsome*, 193 Minn. 157; *Porsmer* v. *Davis*, 152 Minn. 181; *Jackson* v. *Hansard*, 45 Wyo. 201, 218.

chance to correct his own errors without the delay, expense or other hardships of an appeal." See *Greer* v. *Carpenter*, 323 Mo. 878, 882. *Cf. United States* v. *Johnson*, 327 U. S. 106, 112.

There are other practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payments of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit. *Pleasants* v. *Fant*, 22 Wall. 116, 122; *Jones* v. *S. E. C.*, 298 U. S. 1, 19–20 and cases cited. Rule 41 (a) (1) preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And after the filing of an answer, Rule 41 (a) (2) still permits a trial court to grant a dismissal without prejudice "upon such terms and conditions as the court deems proper." [5]

In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that

[5] Rule 41a (2), Federal Rules of Civil Procedure, has been interpreted as authorizing a plaintiff to dismiss his action "without prejudice where the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim." Report of Proposed Amendments to Rules of Civil Procedure (1946) 64; see *United States* v. *Lyman*, 125 F. 2d 67, 138 F. 2d 509; *Home Owners Loan Corporation* v. *Huffman*, 134 F. 2d 314, 317.

the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion. The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

It has been suggested that the petitioner could have presented affidavits to the Circuit Court of Appeals to support his claim for a new trial, and that that court could thereupon have remanded the question to the District Court to pass upon it.[6] Such a circuitous method of determining the question cannot be approved. For Rule 50 (b) specifically prescribes a period of ten days for making a motion for judgment notwithstanding the verdict. Yet the method here suggested would enable litigants to extend indefinitely the prescribed ten day period simply by adoption of the expedient of an appeal. Furthermore, it would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the District Court.

Reversed.

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[6] This general suggestion was made by the Advisory Committee on Rules for Civil Procedure in its recent recommendation to us for modification of Rule 50 (b). The Committee said: "Even on appeal, if the appellate court sets aside his verdict, he may present to the appellate court affidavits to support his claim to a new trial, and the appellate court has power to receive the affidavits and remand the case to the trial court with instructions to consider the affidavits and determine whether a new trial should be allowed." Report of Proposed Amendments, *supra*, 66.